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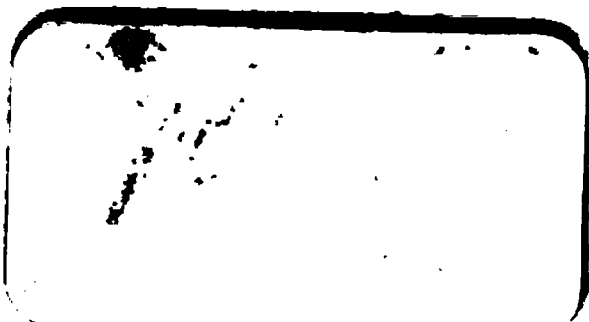
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C A S E S

DECIDED IN THE

COURT OF SESSION,

From November 1790 to July 1792.

COLLECTED BY

ROBERT BELL,
CLERK TO THE SIGNET.

*In decisionum gremio, argumenta, et rationes sententiarum genitricem
fuse explicatas invenire cuperem; auctoribus ita tum advocatorum,
tum judicum munera obeuntibus.*

ORAT. INAUG. D. GEO. M'KENZIE.

EDINBURGH:

PRINTED FOR J. DICKSON, P. HILL,
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1794.



ENTERED IN STATIONERS HALL.

ADVERTISEMENT.

AS some who may be unacquainted with the constitution of the Court of Session, may wish to compare the opinions in this collection, with those that are given in the English books of reports, it is proper to take notice of one or two things, which ought to enter into their consideration.

In England, the questions upon which the Judges have to deliver their opinions, are merely questions of law, reserved by the jury, or arising out of their verdict. These opinions should be clear, simple, and logical; resting on the basis of statute and precedent, or drawn, by a regular deduction, from first principles. With us, a question of mere law seldom occurs, it is commonly blended with facts; and the Judge, in delivering his opinion, must unite the talents of the jurymen with the knowledge of the lawyer. The opinions of a Scotch Judge, are thus necessarily deprived of that clearness, that unity and simplicity, which is chiefly to be admired in a judicial decision.

The constitution of the Court is well adapted for deliberation; the causes are brought forward in printed papers, and the reasons which influence each Judge, on privately considering these papers, he gives openly: he hears the opinions of other Judges; he corrects his own notions; or he removes the errors or mistakes of others. All this goes on in the view of the public; the parties are witnesses to the deliberation, they see whether any thing be misapprehended or omitted, and they have an opportunity of explaining it before a final judgement is pronounced *.

* The open deliberation of our Judges, is a matter of the first importance to this country; it is this, joined to the superior knowledge of the judge over the jurymen, which we have to set in opposition to the boasted privilege peculiar to England, a trial by jury in civil causes.

But however well fitted for deliberation, this constitution is not calculated to bring out opinions that will appear to advantage in a report ; they must approach too nearly to the tone of conversation : the deliberations of a well informed jury may be conceived to resemble them in some degree : or perhaps, the opinions of our Judges bear a nearer analogy to that previous deliberation, which enables the English Judge to lay before the public, not his own opinion merely, but an opinion matured by a communication with his brethren.

The Compiler thought proper to hint at this difference in the constitution of the two Courts ; but he is chiefly anxious to make his own apology ; he would regret exceedingly, should any thing be found here, which could offend the feelings of any individual Judge ; much more would he regret any mistake or omission, which might be imputed to that Court, whose decisions he has presumed to give to the public.

The motives which led to this publication have been already explained, and they cannot be misunderstood. It only remains, therefore, to state the cause of those mistakes which may be found here. The notes for the opinions in this Collection were taken in the hurry of other avocations, and they were allowed to lie over for several months before they were reduced into that form in which they are now presented : whatever appears, then, to deform these opinions, whatever in them is unconnected, or disjointed, or improper, must be attributed to the Compiler.

The numerous errors of the press is still another cause of regret ; the only apology that can be offered is, that while the work was going on, the printer, to whose charge it was committed, was labouring under a tedious and painful disease, to which he has since fallen a sacrifice. The Compiler has endeavoured to remedy the defect by a list of the errors which he has discovered.

TO THE SOCIETY

OF

CLERKS TO HIS MAJESTY'S
SIGNET.

GENTLEMEN,

WHEN I consider the importance of the office which you hold, the extent of knowledge which the proper discharge of it requires, and how necessary it is, that you should be acquainted with those changes in the law, which daily arise from the decisions of the supreme court, I see no body of men, to whom this attempt can with more propriety

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DEDICATION.

The privileges which belong to your
exclusively, the office of con-
all the titles which flow
are made up under your care, and
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every other heritable right: To you
has thought proper to intrust the
summons, which contains the con-
every action that comes before the Court
and diligences of every kind (which are
securities, and conveyances) are prepared
by you alone. These duties are truly impor-
and the commission of an error in the exercise
may draw after it the deepest consequences;
becomes therefore peculiarly desirable that you should
have an accurate view of the decisions of that court,
which is to judge of the form and nature of the actions
which you bring before them; to decide on the im-
port of those deeds which are prepared by you; and to
ascertain the validity, as well as to regulate the pre-
ference of those diligences which must pass through
your hands.

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DEDICATION.

v

It is with a view to answer these purposes that this attempt has been made ; and to your body, if it be of any value, it is certainly due. Allow me to urge as an additional reason for this address, my anxious wish to express that respect, and sincere regard for the interests of the society which I so truly feel.

BUT gentlemen, I do not mean to insinuate that I have the sanction of the society in this undertaking; I will not seek to shelter it under such authority: If this shall be deemed an imprudent or an improper publication, let the odium fall where it ought. The truth is, I have long been thoroughly convinced, that the plan on which most of our decisions have been collected, and more particularly those of a later period, is incapable of attaining the end in view. It is not what is to be found in printed papers that can give a just notion of the principle of a decision; it is what passes on the bench; it is the opinion of the judges, which ought to be preserved in our reports. And surely at no period were these opinions more worthy of preservation than now; at no period can they have displayed more strength of mind, and clearness of conception,

ty be addressed. The privileges which belong to your society, give you, almost exclusively, the office of conveyancers in this country: all the titles which flow from the Crown are made up under your care, and they are the most material of all conveyances, the foundation of every other heritable right: To you the legislature has thought proper to intrust the framing of the summons, which contains the conclusions of every action that comes before the Court of Session; and diligences of every kind (which are truly legal securities, and conveyances) are prepared and issued by you alone. These duties are truly important; and the commission of an error in the exercise of them may draw after it the deepest consequences; it becomes therefore peculiarly desirable that you should have an accurate view of the decisions of that court, which is to judge of the form and nature of the actions which you bring before them; to decide on the import of those deeds which are prepared by you; and to ascertain the validity, as well as to regulate the preference of those diligences which must pass through your hands.

DEDICATION.

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ception, more ingenuity and acuteness, more liberality and good sense.

THE decisions of the Court of Session have brought our law to its present improved state; and from the operation of the same power, we are to expect those farther improvements of which it is susceptible. These decisions form a very principal part of the law of this country; for although that part of it which relates to real property has been derived from the feudal usages, yet these have been very materially changed and modified by the peculiar customs of the country, by our acts of parliament, and more especially by the decisions of our supreme Court. The civil law, the other great source of our jurisprudence, is now reduced to that place which it always ought to have held; it serves only to enrich the pleading of the lawyer, or by its wisdom to aid the decision of the judge. We have, no doubt, statutory law, but it is confined within a very narrow compass; those statutes to which we principally have recourse are the enactments of a military age, and can
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therefore afford but small assistance in deciding the questions which arise in a Commercial state.

It may therefore be truly said, that the law of this country consists principally of the decisions of the Court of Session; and this, although at first sight it may seem dangerous, is perhaps a fortunate circumstance in the situation of this country, and one which may bring our jurisprudence to a state of excellency, by a natural and certain progress,

WHEN the law of a country is moulded into form by the decisions of a court, it must preserve a great consistency and uniformity in all its parts; at the same time that it possesses that flexibility, which enables it to follow the manners and customs of a nation through all the changes to which they are subject.

A Court does not pronounce judgment until the whole facts necessary for judging of the cause are fully known; the question is viewed on every side; all its relations are duly weighed; its effects are fully considered; the wisdom of the bench is employed on
one

one single object: the question recurs under circumstances nearly similar, and the former decision suffers a fresh investigation: this happens again and again, until a general rule be formed, drawn from the united wisdom of our judges, and founded on the firm basis of experience.

How natural and easy must be the progress of law under the influence of this power, and how congenial to the nature of society. We see a constant change in the opinions of men; new views open; fresh objects of pursuit present themselves; and the law must accommodate itself to these changes: in order to decide the disputes of the present day, it must admit the received opinions; and thus the alterations which become necessary, are produced by almost imperceptible degrees, and without the appearance of innovation.

BUT is this the case where the system depends on the positive institutions of the legislature, where the judges are rigorously tied down to decide on the words of an
act

act of parliament? Surely not: an act of parliament, though it may be meant to remove grievances which exist, must nevertheless look forward to cases which are to happen, and prescribe rules by which future and contingent events are to be regulated. But how impossible is it for human foresight to combine circumstances in all the shapes in which they present themselves; the combination of a few only of these circumstances are beyond the powers of calculation, and to provide rules for every individual case, exceeds the utmost stretch of human invention. In such a system many cases must be left unprovided for, many must fall under a general rule which ought to have form as an exception; the law is in a great measure stationary, until it is affected by the operation of a new act, and this will ever come too late for the occasion. The statute-book is thus filled with correctory and explanatory statutes; it becomes a contradictory, unwieldy, and oppressive mass.

Still it may seem odd to maintain, that the power of declaring law, and of carrying it into execution is

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best lodged in the same hands; but the power exercised by a judge is of a nature very different from that of a legislator. He must perceive that he is surrounded on all sides by positive rules which are not to be infringed, he must feel that he is invested only with the power of doing what is right; for he must be conscious that he cannot act contrary to his duty, without being exposed to the observation of the public, and of those who are urged by the most powerful motives, to discover and to expose any improper means, by which their interests may have been affected.

I might remind those who still object, of the situation of the law of insurance in a neighbouring country, I might carry them back to the state in which it was found by that venerable judge, under whose protection it has been reared, and by whose wisdom it has been matured, until it now stands forward, the most prominent, and polished part, of English law.

Viewing the matter in this light, there cannot be a more important object than the decisions of our judges ;

judges; not to a professional man alone, but to every man in the nation. An attempt to render more complete the reports of these decisions, and to bring before the public the opinions from which the ultimate judgment is formed, and without which it is impossible that the decision in a particular case can ever serve as a precedent, can therefore require no apology. By some perhaps, this may be considered as an encroachment on the province of those gentlemen who are appointed by the faculty of advocates to collect the decisions of the Court: I should be sorry indeed, were this to be considered as an invidious undertaking; were it of that nature, so far from receiving your support, I am certain that I should for ever deprive myself of your protection. But it is impossible that so unjust a construction can be put upon this attempt: It is an attempt, honourable and proper for your society; I have engaged in it, from that feeling; I have been led, by no other motive: should it meet with encouragement, and under your patronage grow into notice, it can be productive only of that emulation, which in Eng-

land has brought their reports to a degree of perfection far beyond what we can boast of.

I have been anxious in this collection, to preserve every case of importance. I have given a detail of the circumstances upon which the question turns: In most cases the pleadings are given so fully, that I would fain hope it will be found unnecessary to have recourse to the printed papers; and the grounds of the judgment are invariably subjoined. But it will not be understood that there is any attempt to give the words of the judges, my object has been only to preserve such an account of the opinions, as may lead to a knowledge of the real principle of the decision; and I am conscious that even in this view there are many inaccuracies to be forgiven.

I cannot conclude without assuring you, that I have bestowed unwearied pains in procuring the materials; and I have done it under circumstances, surely of a nature exceedingly discouraging: I have made the abridgement with very particular care; If I shall have been
so

DEDICATION.

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so fortunate as to have given, (in the opinion of those who are acquainted with the cases) an accurate account of each ; if I have in any degree contributed to preserve the opinions of the judges, or if it appear to you that I have executed an acceptable work, I shall have fully attained my object. I remain,

Gentlemen,

Your most obedient,

And very humble servant,

ROBERT BELL.

Queen's-Street, Edin. }
May 12. 1793. }

ADVERTISEMENT.

THE CASES in this Collection are arranged under heads, rather than in the order of time. The Table of Contents will show the nature of the cases, and there will be an index to the names of the parties: It is also intended to point out, by a separate index, those cases which are referred to as authorities, either in the pleading of the parties, or in the opinions delivered by the judges. But until the volume be completed, it is impossible to make the proper references; and therefore the present index and table of contents are intended to be temporary only, and will be entirely superseded by the more complete ones, which are to accompany the remaining part of the volume. The references at the foot of each case point out the volume and number of the printed papers belonging to the Society of Clerks to the Signet.

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to one another. But this point has since received a very deliberate
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ing was ordered, when the plea of the reverser was supported by Mr.
rgusson and Mr. Solicitor General; that of the adjudging creditor by
and the Dean of Faculty.

case of *Campbell v. Jack* there had been no declarator of expiry of the
in the case of *Landales v. Carmichael*, there was a decree of declarator,
had been obtained in absence of the reverser. There were thus two que-
before the Court: 1. Whether the expiry of the legal *ipso jure*, and with-
any declarator, cuts off the right of reversion? 2. If it do not, whether a
ce of deltarator, though in absence, has that effect? The judges in delivering
r opinions, seemed to think, that now, when adjudications have so entirely al-
ed their nature, that in place of sales, in which the price is precisely commensurat-
to the subject, they have become securities, which whatever the amount of the
debt may be, extend over estates of the greatest value; the expiry of the legal (as
it was originally understood) becomes highly penal; and therefore the same rule
should be applied to it, which, to the honour of the Court, has been applied to
other penal irritancies: That consequently the right of reversion is not cut off by
the mere expiry of the legal; but at whatever time a declarator may be brought,
it is competent for the reverser to purge the incumbrance. With regard to the
effect of a decree of declarator in absence; it was thought, that as the reverser
was then called upon to redeem his subject, his neglecting to do so should for ever
preclude him from calling in question the right of the adjudging creditor, upon
the footing of any disproportion betwixt the value of the property carried off, and
the amount of the debt; though against other objections founded upon nullities in
the original diligence, or actual extinction of the debt during the course of the
legal, the decree in absence could afford no protection.—This judgement was pro-
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Cases referred to,

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<i>Edmonstone</i>	<i>v. Edmonstone</i> , (1769) p. 183.
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<i>Livingston</i>	<i>v. Lord Napier</i> , p. 184.
<i>Campbell of Blythswood</i>	<i>v. Love</i> , p. 204. 206. 211. 212. 214.
<i>Lord Kinnaird</i>	<i>v. Hunter</i> , p. 205.
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Perchard and Brook v. Brackenridge, p. 121.

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Robertson v. Duke of Athole, p. 235.

Trustees for Marquis of Lothian v. Simpson, p. 290. and p. 333.

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* This case has been carried to the House of Peers by appeal, where the judgment of the Court of Session was reversed, and the lease set aside.

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Halibarton v. Maxwell, p. 155.

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Cases referred to.

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* There is a mistake in numbering the pages, the Nos. of eight pages, being repeated; there is thus two pages at the distance of eight from each other, marked 440 it is the second number that is referred to here.

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CASES DECIDED

IN THE

COURT OF SESSION.

ADJUDICATIONS.

I. Sir JOHN SINCLAIR of Ulster, Baronet,

AGAINST
PATRICK SINCLAIR.

A decree of adjudication can proceed on a liquid ground of debt only. But where there is danger of a creditor's being excluded by a previous adjudication, the Court will give a decree of constitution (though the claim be disputed), reserving all objections *contra executionem*.

SIR John Sinclair brought an action against Patrick Sinclair for the balance of an account. This action came into Court in June 1790; but objections were stated to the demand, which prevented a decree from going out. On the 28th January 1791 an adjudication was led against the estate of the defender by another creditor; and in order to come within year and day of this first adjudication, Sir John Sinclair stated, in a minute, the necessity of his obtaining a decree of constitution; reserving all objections; and accordingly the Lord Ordinary “decerned against the defender in terms of the libel, reserving all objections *contra executionem*.” Nov. 19. 1791. Against this judgment a representation was presented for the defender, which was appointed to be answered; and it appeared probable, that, in discussing the claims of the parties, it would be necessary to send them to an accountant.

In this situation of matters Sir John Sinclair raised a new action against Patrick Sinclair, concluding for adjudication, and for payment of the sum contained in the former action; and both diets being run, a petition was presented for Sir John, praying to “allow the petitioner’s summons of adjudication to be called and enrolled, and decree pronounced therein, reserving any objection *contra executionem*, agreeably to the interlocutor 19th November 1791, or to give such other relief as their Lordships should see cause.” Jan. 25. 1792.

B

When

CASE
I.

C A S E
I.
OPINIONS.

When this petition came to be advised, it was observed by Lord Eskgrove, that it would be contrary to all form to allow an adjudication to proceed without a liquid ground of debt, or a previous decree of a court constituting the debt: that this was a rule he had never known infringed. Where there was danger of a creditor's being cut out by a previous adjudication, the constitution ought to be granted under a reservation of every objection *contra executionem*.

The Lord Justice Clerk approved of the doctrine laid down by Lord Eskgrove, and observed, that, in the whole course of his practice, the consideration of getting within year and day of a first effectual adjudication had been reckoned a sufficient answer (in that stage of the business) to any objection brought against the adjudication, or against any of the previous steps, which might have the effect of delaying that diligence.

The Lord President thought the interlocutor which had been pronounced by the Lord Ordinary in the former action a very proper one; and that the regular way of discussing the objections was by a suspension at the instance of Patrick Sinclair, which it was agreed would pass without caution.

Lord Henderland then proposed, that, in order to keep this matter in form a decret of constitution should be pronounced, reserving all objections *contra executionem*, that this decree should be allowed to be extracted (without waiting for the minute-book), in order to found the adjudication, and that the Court should grant a warrant for inrolling the adjudication in this week's roll for the Outer-house.

The prayer of the petition was altered, in order to meet this view of the matter, when the Court pronounced the following judgment:

JUDGEMENT.
Jan. 26, 1792.

‘ The Lords remit the foresaid process of constitution to
‘ the Lord Dreghorn, with power to his Lordship, with or
‘ without a regular hour, to call the cause, and to recal his
‘ Lordship's interlocutor, appointing the last representation
‘ for the defender to be answered, to refuse the same and
‘ adhere to his Lordship's interlocutor 19th November last,
‘ reserving all objections *contra executionem*, and to dispense
‘ with reading the said decree in the minute-book. Also the
‘ Lords remit the petitioner's summons of adjudication against
‘ the defender to Lord Dreghorn, with power to his Lord-
‘ ship to call the process of adjudication without a regular
‘ hour, and to decern therein, reserving all objections *contra*
‘ *executionem*.’

For Purs. G. Ferguson, } Advocates. If. Grant C. S. } Agents.
Def. Craig, } W. Anderson C. S.

Inner House. Menzies, Clerk.

Vol. IX, N^o. 2.

II. In the Ranking of the Creditors of HUGH ROSS of Kerse,

HENRY PEIRSE, Esq; of Bedale, &c. .

A G A I N S T

MRS. ELIZABETH ROSS, Widow of the late HUGH ROSS
of KERSE.

It is not necessary in an adjudication to specify the parish and county within which the lands lie, if they be otherwise particularly described.

Mrs. Ross adjudged the lands of Auchingie from the present Hugh Ross, as having belonged to his father the late Hugh Ross, but without mentioning the parish or shire within which they lay. The adjudication proceeds on a special charge against the present Hugh Ross to enter heir to his father in these lands. When this adjudication came to be ranked, it was objected by the other creditors that this omission in the description of the subject rendered the adjudication null and void.

C A S E
II.

The Court were of opinion, that, in the circumstances of the case, it was clear that the lands in the adjudication were the lands which belonged to the debtor, and on that ground repelled the objection.

O P I N I O N S.

Lord Hailes said he would have opposed this opinion had there been two parcels of lands answering to the same description.

The Lord President was for sustaining the objection.

The Court repelled the objection.

VOL. I. No I.

III. In the same Ranking, and betwixt the same Parties.

1. What steps are necessary to constitute the first effectual adjudication when the superior is not entered.

2. A crown charter of adjudication, when the property, as well as the superiority of the lands, is in the debtor; but unconsolidated, will carry right to the superiority only.

I. The lands of Littlemiln, in the shire of Ayr, belonged originally to Christian Crawford of Kerse (1727), and were held in feu of Lord Cathcart. She stood infeft in virtue of a precept of *clare constat* from the superior, and in the 1737 she

C A S E
III.

FIRST PARCEL
OF LANDS.

ADJUDICATIONS.

C A S E
III.

he disposed these lands to William Rofs writer in Edinburgh, who took infeftment on the precept in the disposition.

William Rofs was succeeded by his brother the late Hugh Rofs of Kerse; but as William's affairs were in disorder, Hugh purchased up his debts by the hands of a trustee, at whose instance an action of constitution was brought, and in which Hugh having renounced, a decree of cognition and adjudication *contra hereditatem jacentem* was obtained.

This decret and the grounds of debt were reconveyed to Hugh Rofs by the trustee, but no infeftment was ever expedite, and thus he came to have a *personal* right to the *property* of the lands.

In the 1757 Hugh Rofs obtained a disposition to these lands from Charles Lord Cathcart the superior, and upon the procuratory in this disposition he expedite a crown charter of resignation. Hugh Rofs was, in virtue of this charter, infeft in part of the lands, and Hugh Rofs, his son, in virtue of a conveyance from him, was infeft in the remaining parts of them. On the death of Hugh Rofs the father, the son expedite only a general service.

In this state of the titles the following methods of affecting the lands were pursued by the competing parties.

Mrs. Rofs having led an adjudication in January 1780, she obtained a crown charter of adjudication of the whole lands, as well those in which the father was infeft, as those over which the son's infeftment extended; and on this crown charter Mrs. Rofs was infeft.

Mr. Peirse, on the other hand, (whose adjudication was expedite in the 1788) charged Mr. Rofs the son as superior of these lands of Littlemiln.

The infeftment in favour of Mrs. Rofs was of a prior date to the charge at the instance of Mr. Peirse.

On this state of the securities it is urged for Mr. Peirse, that Hugh Rofs the son had right to the superiority and property by separate titles, and that there was no consolidation; consequently that the crown charter of adjudication expedite by Mrs. Rofs made her adjudication effectual, only in so far as related to the superiority: but that the property, held of Mr. Rofs himself, could not be vested in the person of an adjudger, unless by a charter from him as superior; and consequently, that in order to render an adjudication of the subject effectual, a charge of horning against the present Hugh Rofs was necessary, a step which Mr. Peirse had accordingly taken.

To this it was answered for Mrs. Rofs, That the present Hugh Rofs was certainly the heir to his father in the lands in question; that it appears to have been the intention of the late Hugh Rofs the father, that the disposition from Lord Cathcart, by which the superiority and property were conveyed, should be the

the radical title to the *plenum dominium* of the estate; that Mrs. Rofs having adjudged the land, with all right, title, and interest which the debtor had in it, her adjudication ought to be sustained as the first effectual one over both property and superiority.

C A S E
III.

II. These were not the only lands in the adjudication, there were besides the lands of Auchingie, &c. The titles to these were in a situation somewhat different. They had belonged to Adam Crawford Newall, who stood infest, holding of the Earl of Dumfries. The late Hugh Rofs purchased these lands from Adam Crawford Newall, and having resigned them in the hands of the superior, he obtained a charter of resignation, on which infestment followed, (1772). The late Hugh Rofs afterwards acquired right to the superiority, he expedite a crown charter, and was infest thereon, (1778).

SECOND PARCEL
OF LANDS.

On the death of the late Hugh Rofs, the present Hugh Rofs made up his titles to the property, by granting a precept of *clare constat* to himself, as heir to his father.. It contains no clause of consolidation, and the holding is the same as formerly; infestment followed on it. Afterwards he made up titles to the superiority by a charter from the crown, but no resignation *ad remanentiam* was executed.

With regard to this parcel of lands, it was stated for Mr. Peirse, that agreeably to the principles in the noted case of Bald against Buchanan, there was not such a consolidation of the two rights in the person of Hugh Rofs as to make him crown vassal in any more than the superiority, and consequently that that right alone had been attached by the crown charter in favour of Mrs. Rofs; but that in so far as related to the property, the adjudication at Mr. Peirse's instance was the first effectual one.

To this it was answered for Mrs. Rofs, that a consolidation of the property and superiority was not necessary; at any rate, that her adjudication did effectually carry the property as well as the superiority of the lands.

The Lord Justice Clerk observed, that a charge given to the real superior, although his titles were not complete, would be held in law to be sufficient to render an adjudication effectual; and the question here comes just to this, Whether a charge to an apparent heir in the superiority be in the eye of law an effectual charge at the instance of an adjudging creditor? His Lordship thought it was.

OPINIONS.
FIRST PARCEL
OF LAND.

Lord Dreghorn said, that where the superior lay out unentered, the law gave a remedy.

The Lord President observed, that a vassal may go to the crown where the superior refuses to receive him. But his Lordship thought, that where the superior is unentered, it is necessary

C A S E
III.

cessary first to charge him to enter, then to charge him to receive the adjudger. The creditor does not go at once to the crown, he must previously have taken measures for forcing the superior to complete his titles.

Lord Henderland said, that his doubt arose from Rofs's not being truly the superior. He had never been entered as such.

Lord Justice Clerk then said, that a circumstance had occurred to him, upon reconsidering the state of the titles, which had not been taken notice of by either of the parties, it was, that Hugh Rofs was not the proper superior to be charged: in consequence of the base infestment taken by William Rofs upon Christian Crawford's disposition, she and her heirs remained superiors over the base right until confirmation; but as there had been no confirmation, it was inapt to charge the mediate superior; and his Lordship recommended to the agent for Mr. Peirse to find out and charge Crawford's heir, and then render his adjudication the first effectual one. In this opinion the rest of their Lordships coincided,

SECOND PARCEL
OF LANDS.

The Lord President thought that there had been no consolidation, and therefore, that as to the property, a charge to Rofs was sufficient to render the adjudication effectual. His Lordship observed, that in Bald's case a nice question occurred; it was this, Whether, when the property and superiority came into the same person there is a virtual consolidation? The Court found, that on feudal principles there was no such thing as an *ipso jure* consolidation.

The Lord Justice Clerk said he had no doubt on that subject; he was clear in Bald's case, and should be sorry to see that judgement overturned.

JUDGEMENT.

As to the lands of Littlemiln, find that neither of the parties have produced a first effectual adjudication; and as to the lands of Auchingie, find that the adjudication for Henry Peirse is the first effectual one, *quoad* the property.

VOL. I. No 1.

IV. In the same Ranking, and betwixt the same Parties.

Although the infestment on a crown charter of adjudication be cut down, still the adjudication will be considered as the first effectual adjudication.

C A S E
IV.

The lands of Midfearns were adjudged both by Mr. Peirse and Mrs. Rofs. Mrs. Rofs obtained a crown charter of adjudication, on which she was infest on the 5th December 1788. Mr. Peirse likewise obtained a crown charter of adjudication, and, in virtue thereof, was infest on the 30th December 1790.

The

ADJUDICATIONS.

7

The infestment taken by Mrs. Rofs was reduced by a final judgement, on the misnomer of one of the instrumentary witnesses; and on this ground Mr. Peirse contended that his adjudication was rendered the first effectual one.

C A S E
IV.

Mr. Peirse said, that Mrs. Rofs might perhaps argue that it is not the first infestment, but the presenting of the first signature, which makes the first effectual adjudication, and therefore he must observe that this rule applies only where the party is *in cursu* of expediting the charter, and completing it by infestment: so soon as he becomes *in mora*, he may be excluded. In this case the signature was presented in 1780, and there is as yet (1791) no valid infestment upon it.

Mrs. Rofs, on the onther hand, argued, that the act 1661 relates solely to the preferences amongst adjudgers, and has no reference whatever to questions arising with other parties. In questions between apprisers, the rule holds universally, that the presenting of a signature in exchequer, or a charge where the lands hold of a subject, makes the first effectual adjudication. An adjudication is preferable to a voluntary right granted after the subject has been rendered litigious; but that is not in virtue of the statute 1661, it is the effect given by law to litigiosity: but as this effect would be exceedingly rigorous, were it extended to cases where the adjudger has lain by for years without completing his diligence, the plea of his having been *in mora* is sustained. It is only in questions with third parties, however, that it is sustained; it has no place in questions amongst adjudgers themselves. Besides, it does not appear that Mrs. Rofs has been *in mora*; the setting aside of her infestment affords no evidence of any undue delay on her part.

The Lord Justice Clerk said, that the want of the sasine was nothing. The presenting of the signature in exchequer was sufficient to make a first effectual adjudication.

OPINION.

The Court repelled the objection proponed against the adjudication produced for Mr. Elizabeth Rofs, and found that it was the first effectual adjudication, *quoad* the lands of Milsearn.

JUDGEMENT.

For Purs. W. Honyman, }
Def. A. Abercromby, } Advocates.

Archibald Swinton C. S. }
Bain Whyte C. S. } Agents.

Lord Swinton Ordinary. Sinclair Clerk.

VOL. I. No I.

* V. GEORGE GORDON of Rothsay and others, Creditors
on the Estate of Kincaigie, Chargers ;

AGAINST

ROBERT BYRES Merchant in London, and WILLIAM BLACK
of Netherdon, and ISAAC GRANT C. S. his Cautioners,
Suspenders.

Adjudications having been led against an estate, on the supposition that it was feudally vested in the debtor, whereas he possessed part as apparent heir only ; and a sale having followed on these adjudications, the error was allowed to be rectified after the decree of sale had been extracted.

C A S E

V.

Alexander Auchindachy of Kincaigie was proprietor of the lands of Ceividly and of the lands of Kincaigie. The former was purchased for his behoof during his minority, and his title to them was completed by investment ; the other was a paternal estate.

Auchindachy expedite a general service as heir male of provision to his father. In the 1768 he obtained a precept of *clare constat* for investing him in the lands of Kincaigie, which held of a subject superior. On this precept, however, no investment was ever taken.

Auchindachy's affairs having gone into disorder, adjudications were led against both estates ; the creditors proceeding on the belief that their debtor was feudally vested in both. On these adjudications a process of sale was brought, and Mr. Boyes was preferred as the purchaser, at the price of L. 6200 Sterling.

Before the sale was reported to the Court, Auchindachy gave in a petition, stating, that as no title had been made up in his person to the lands of Kincaigie, which were still *in hereditate jacente* of his father, the adjudications, all of which had proceeded without a previous charge, were void and null, and the sale which had been raised on them equally so.

This petition was remitted to the Lord Justice Clerk, who sustained the objections to the adjudications. In order to remove the objection, the creditors executed letters of general special charge against Auchindachy, charging him to enter heir of line and heir male and of provision to his father, and on this charge they led new adjudications.

* In this case a separate point occurred, which will be found under the title of entails. The question was, Whether an entail can be cut off by the negative prescription, though during the greater part of that time, the institute, who was gaining, and the substitute, who was losing, were both under age?

During

ADJUDICATIONS.

9

During the dependency of these adjudications the sale was reported and approved of. A petition for Auchindachy against this judgement was refused, and the decree of sale was extracted.

C A S E
V.
—

A process of reduction was then raised by Auchindachy and his sister, on this ground, amongst others, that there was no title in Auchindachy's person when the original adjudications were led, and that the subsequent adjudications could not, by a retrospective effect, accresce to the sale.

From this action Mr. Byres, the purchaser, was assilzied, on this ground, that the pursuers had produced no proper title to carry it on, a defect which may still be supplied. In the mean time, Mr. Byres became bankrupt, and the creditors having pursued the cautioners for the price, a suspension was raised, in the course of which the Lord Ordinary appointed the cause to be stated in memorials.

Auchindachy was not infest in the lands of Kincraigie, yet the sale proceeded on adjudications led without a previous charge, new adjudications have since been led, preceded by the necessary charge; and the question is, Whether the sale is validated by this new and anomalous operation.

Argument for
the Suspenders.

There are two grounds on which it may be maintained, that these new adjudications cannot accresce to the sale; for, 1. Auchindachy is entitled to presume, that had this error not been fallen into, and had the estate been exposed upon a proper title, it would have brought a higher price. 2. A challenge was actually brought before the new adjudications were led; so that a *medium impedimentum* arose, sufficient to prevent them from accrescing to the sale.

But it has been pleaded for the creditors, that as Auchindachy was regularly infest in part of the lands under sale, and as that part was properly attached by the first adjudications, the creditors were entitled to proceed in the sale of the remaining lands, in terms of the act of sederunt 1756.

In answer to this, it may be proper to consider how the law stood prior to this act of sederunt. By the act 1681, c. 17. the pursuer of a sale must have been a real creditor on the estate, the whole lands belonging to the debtor must have been included in the sale, and the most trifling omission was fatal to the action. It was this last particular alone which the act of sederunt was meant to remedy. The words of this act do not go the length of authorising the sale of a part of the bankrupt's estate, to which he has no proper title, any more than it authorises an adjudication in such a case. Indeed, a judicial sale is a species of adjudication, and must be governed by the same rules; and it does not occur how the Court could

C

adjudge

C A S E
V.

adjudge to a purchaser what was not vested in the person from whom it was adjudged.

Argument for
the Chargers.

The titles to the lands of Ceividly were complete in the person of Auchindachy, and consequently the first adjudications to that extent were unchallengable; of course the sale, in so far as it related to these lands, was also unexceptionable. In this situation, the creditors, in terms of the act of sederunt, were entitled to include in the sale, every other estate belonging to their debtor which had been omitted. It is, no doubt, necessary to take the estate of Kincaigie out of the *hereditas jacens* of old Auchindachy, and to convey the diligence to the purchasers, but this may be done at any period of the sale; for the express purpose of the act of sederunt was to enable the creditors to supply any omission in the enumeration of the lands belonging to the bankrupt, or to correct any error in completing the attachment of the estate.

It is not necessary that the creditors should be in possession of the whole estate, 11th July 1699, Learmonth *contra* Gordon, 16th November 1764, Paterson, Fac. Col. The sale is valid, if it proceed on regular adjudications against part of the estate: and with regard to those parts to which no title was completed in the bankrupt, it is sufficient that decrees of adjudication, as titles of possession, be furnished to the purchaser on his paying the price. Such decrees the chargers are prepared to give. Besides, this question is to be considered as a *res judicata*, in consequence of the judgement of the Court in the question with Auchindachy himself.

The question of prescription which occurred here, as well as the state of the entail, which was thought to be similar to that of Peirse against Russell, induced the Court to order a hearing, when their Lordships delivered their opinions principally on the effect of the plea of prescription. The judgement pronounced on the point argued in these memorials was in these words:

Judgement.
Jan. 31. 1792.

“ Find, that the decree of sale in favour of Robert Byres,
“ connected with the adjudications which were led prior and
“ posterior thereto, is a good and valid heritable and irre-
“ deemable right to the lands of Kincaigie, and others there-
“ in mentioned, purchased by him.”

For Chargers, J. Wolf Murray, } Advocates. Wm. Gordon C. S. } Agents.
Suspender, Geo. Ferguson, } Alex Grant C. S. }

Lord Swinton Ordinary Menzies Clerk.

VOL. IX. NO. 1.

VL JAMES CAMPBELL, Merchant in Dundee, Pursuer;

AGAINST

**JOHN SCOTLAND, Merchant in Perth, and ALEXANDER JACK,
also Merchant there, Defenders.**

An expired legal will not entitle a creditor to carry off an estate at an under-value.

John Watt was proprietor of a tenement in the town of Dundee. He contracted several debts, and in security of them granted heritable bonds over this subject.

C A S E
VI

Watt died, and these debts having come into the person of George Gibb, he charged a daughter of Watts to enter heir special to her father; and having obtained a decree of constitution against her, he adjudged the subject in payment of L. 530 Sterling. These steps were taken during the minority of the daughter.

1752.

1757.

Gibb, in virtue of this adjudication, sold the subject to the following persons:

Lot 1. To Dr. Baillie, at	-	-	L. 208
2. To Mrs. Ramsay, at	-	-	208
3. Consisting of the remaining parts of the subject to Mrs. Baillie, widow of Dr. Baillie,			67
			<hr/> L. 483 <hr/>

On the death of Dr. Baillie and his wife, the 1st and 3d lots descended to his two daughters; one of whom was married to the pursuer, the other to Andrew Cuthbert, and Mrs Cuthbert having conveyed her share to her husband, it is now in the persons of the defenders, in virtue of an adjudication led at their instance as creditors of Cuthbert.

The pursuer having thus, in right of his wife, acquired one half of the 1st and 3d lots, he purchased from James Watt, the heir of the original proprietor, his right of reversion, and afterwards bought up Mrs. Ramsay's interest in the 2d lot. He then, in his character of reverser, brought an action against Messrs. Scotland and Jack, who were now in right of the other half of the 1st and 3d lots; concluding, 1st, for reduction of the adjudication by George Gibb; and 2dly, for the reduction of the adjudication, at the instance of Scotland and Jack against Cuthbert.

1783.

In this action the defenders had objected to the pursuer's title, on this ground, that Watt, his author, the heir of the original proprietor, had renounced to be heir, and could not

C A S E
VI.

Nov. 18, 1790.

wards resume the character, nor give a valid title to the pursuer; they also maintained their defence on the expiry of the legal. The Lord Ordinary pronounced this judgement: "Repels the defences stated to the renunciation and expiry of the legal, and finds that not only the intromissions of the defenders themselves, but likewise these of Gibb, the original adjudger; and those deriving right from him are to be imputed in extinction of the debt contained in Gibb's adjudication; appoints an account of the intromissions to be lodged, &c." Against this judgement a petition was presented for Messrs. Scotland and Jack, the defenders.

Argument for
the Defenders.

The pursuer claims in right of the original reverser, consequently every objection which would have been competent against him must now be good against the pursuer; and this action is no other than an attempt to open up an expired legal, at the distance of thirty-four years from the date of the adjudication, and where the subjects were of less value than the amount of the debt for which the adjudication was led.

The defenders conceive it to be the law of Scotland, that after the expiry of the legal reversion, the right to the lands adjudged is carried irredeemably to the adjudger, who possesses from that period, not as creditor, but as proprietor; and if there be instances of the Court's having opened up an expired legal, it is only where there was the strongest reason for exerting those equitable powers of which it is possessed, Ersk. B. II. tit. 12. § 22.

So far was this carried, that it was long questioned whether a co-adjudger within year and day had a right to open up an expired legal; and it was not till the decision in the case of Barclay of Towie, 23d June 1720, (select decisions, No 19.) that this point was fixed: and agreeably to this, Erskine, B. II. tit. 12. § 23. although he admits that an adjudication, after the expiry of the legal in a question with adjudgers, is no more than a security, yet he considers it as an irredeemable right of property in questions with the debtor.

But the defenders will not pretend to dispute, that even in a question with the reverser, if there be a gross defect or informality in the diligence, at the same time that the debt is greatly disproportioned to the value of the estate, this may be a ground for opening an expired legal, Bankton B. III. tit. 2. § 59. Every case must however depend on its own circumstances, and here there is neither a *pluris petitio*, nor defect of any kind in the diligence; the debt exceeded the value of the subject, and the right has been acquiesced in for a very long period of years: there is therefore no equity in dispensing with the rules of law in this case.

It

It has been said by the pursuer, that a declarator of the expiry of the legal was necessary to have supported the defenders plea. But this is by no means the case; the use of a declarator is merely to show that the debt has not been wholly extinguished during the currency of the legal, Bankton, B. III. tit. 2. § 65. Here such proof is unnecessary, as the value of the subject was considerably below the amount of the debt.

Besides, wherever an adjudger continues to possess a subject after the expiry of the legal, whatever the amount of the debt may be, it is extinguished; he is then a proprietor, and is no longer a creditor, Bankton, B. III. tit. 2. § 49. 18th June 1675, Laird of Leyes *contra* Forbes.

Upon the whole, the defenders cannot discover any instance in which the Court have opened up an expired legal, unless where there were informalities in the diligence, and where the debt appeared to have been overpaid by the intromissions of the adjudger. This, it is believed, happened in the late case of Pymweeks against the Earl of Aberdeen; and yet the Court in that case went into a very minute comparison between the intromissions and the amount of the debt.

It remains to be mentioned, that were there grounds on which to open up the expired legal, there is no propriety in making the defenders liable for the intromissions of Gibb, the original adjudger, or of the purchasers from him.

By the statute 1621, c. 6. it is enacted, that apprisers "shall be accountable within the legal," which is equivalent to a declaration, that, after the legal, they are not accountable; and to this purpose, Bankton, B. 3. tit. 2. § 73. Indeed, the defenders hold this to be law, and there are decisions in the Court, finding, that where the legal has been opened, so as to admit the debtor to the equity of redemption, yet this has been, only to the effect of entitling him to make payment, the legal having at the same time been held as expired with regard to other effects, Principles of equity, vol. I. p. 381. Feb. 2. 1711. Guthrie *contra* Gordon.

This is not only the necessary consequence of the adjudger's being considered as proprietor after the expiry of the legal, but a contrary doctrine is attended with manifest inexpediency and injustice. Where subjects have been sold for an adequate price to persons who, *bona fide*, levied and consumed the rents as proprietors, it may be easily conceived, if the legal be opened, how impossible it must be for the party against whom the challenge is brought to give any sort of account of the intromissions of his various authors. His being made liable for them would therefore be an act of the grossest injustice.

In point of fact, the pursuer thought it proper to state, that the dispositions granted by Gibb, the original adjudger, were not
Argument for
the Pursuer.

C A S E
VI.

not irredeemable rights, but expressly bore to be redeemable, conform to the adjudication; and on this uncertain tenure the subjects had actually given L. 30 more than the amount of the principal and interest of Gibb's debt, which shows that the real value of the subjects, had they been sold on a proper title, was very greatly superior to the amount of the debt.

On the point of law, the pursuer admitted that it was laid down by our writers, that, after the expiry of the legal, the estate became the property of the adjudger; yet he maintained that there was now no such rule acknowledged in the law of this country.

In the first place, the pursuer calls on the defenders to point out a single instance where their plea has been sustained, to the effect of wresting an estate from a debtor the day after the expiry of the legal; and if the defenders cannot establish this on any principle, neither will they support it, although the attempt should not be made for twenty or thirty years after the expiry of the legal.

In the next place, how has a declarator of the expiry of the legal been introduced into practice? for if the expiry be *ipso jure* a forfeiture of the right of the debtor, a declarator was an expensive and an unnecessary ceremony, yet these declarators have been very ancient in the practice of the Court. They constitute a presumed dereliction, and seem to authorise the Court to refuse an equitable relief to a debtor, so totally inattentive as to permit a declarator to pass against him.

But the pursuer shall state authorities in support of this usage; and he shall first refer to the case of Chalmers *contra* Oliphant, (Fac. Coll. March 5, 1766.) In this case possession had followed on an adjudication in the 1713, and had continued for near fifty years. The creditor did not support his right on the expiry of the legal, which would have been a sufficient defence had the defenders plea been a good one, and the Court found it incumbent on the defender to produce the grounds of his adjudication.

The next, Caitchen against Fleming * has not been collected, but it is precisely in point, as it finds that an expired legal

* CAITCHEN against FLEMING.

This case appears to have been a very different one from that of Campbell against Scotland and Jack; for it was not properly an adjudication of the heritable subject itself, but of an heritable bond affecting that subject: and as the adjudger of the heritable bond could be in no better situation than the creditor in that bond, and of course could intronit under that right only to the extent of the debt; the Court found that the adjudger was accountable for all super-intronnitions. The circumstances are shortly these:

1708. Alexander Hunter was proprietor of a subject in the Cowgate of Edinburgh,
1723. over this subject two heritable bonds were granted to Edward Baillie. On these Baillie entered into possession of the subject. After Baillie's death an adjudication was led by one of his creditors for payment of a debt of L. 4512 Scots. One Patrick Tod acquired right to this adjudication; he obtained a charter, and was infeft in the subject in the 1751. In the 1753 he sold it to Fleming.
Caitchen

legal will not prevent a fair count and reckoning from taking place, and also that the creditor in possession must account for his intromissions with the rents.

C A S E
VI.

In the case of Anderson, decided 3d March 1758, an adjudication with an infestment, but on which no possession had followed, was cut down by the negative prescription, which shows that adjudications are considered merely as securities, and not as rights of property. It only remains to take notice of the case of Pymweeks against the Earl of Aberdeen. The Earl founded on a charter of adjudication and infestment, so far back as the 1723. The first defence was prescription, and 2dly, the expiry of the legal. But the estate had been life-rented by an old lady down to the 1751, so that there were no *termini habiles* for the first defence; and the matter being reported to the Court by Lord Eskgrove, their Lordships repelled the plea of prescription. “ And before determining the Jan. 24, 1788.
“ objections to the other plea of the expired legal, ordained the
“ Earl of Aberdeen to give in a special condescendence of the
“ value of the estate in the year 1751, and what the Earl’s debt
“ amounted to at that period.” States were prepared, and a proof led, but the question was settled by arbitration.

The difficulty which the Court expressed in this case proves that their Lordships thought there was a usage contrary to the strict letter of the statute; and holding this custom to be established, the only question that remains is, to what extent it can be carried upon those principles of equity which have introduced it?

Lord Bacon’s definition of good law, is *quæ sit in intimatione certa, præcepto justa, executione commoda*; and the pursuer submits, that as the decisions of the Court tend to establish adjudications as rights in security, and not as rights in property, it will be *in intimatione certa*, and *in executione commoda*, to establish, that no adjudication, unless with a decree of declarator of the expiry of the legal, or a charter and infestment followed by forty years possession, ought to be considered as vesting an irredeemable right of property in the adjudger. Such a rule will also be *in præcepto justa*, for every creditor will then know how to protect himself against a challenge, and how to convert a right in security, into an irredeemable right of property.

Catchen the heir of Alexander Hunter, the proprietor of the subject, made up his title to it by a charter and infestment from the magistrates of Edinburgh. He then brought his action against Tod and Fleeming for reduction of the whole titles in their persons, and for making them account for their own, as well as for the intromissions of their authors, with the rents of the subjects. It appeared in this action that the heritable debts had been extinguished in the 1741 by intromissions.

Lord Kennet Ordinary repelled their defence founded on the expiry of the legal, and found them liable for the whole rents from the 1741. His Lordship so far altered this judgement as to limit their accounting to the rents actually received; and this judgement was affirmed by the Court.

how

C A S E

VI.

Opinions.

Lord *Justice Clerk*—I wish to know the value of the subject, for if a subject, greatly superior in value to the amount of the debt, be carried off by an expired legal; an extraordinary advantage is given to the creditor. The action of declarator of expiry of the legal is not to be thrown out of the law; it is an equitable and useful action. By this action the debtor is solemnly called upon after the expiry of the legal to pay up the debt which he is due, he is put upon his guard; and, on the other hand, it prevents the property from being hung up and rendered useless to the creditor. It shows likewise, whether any undue advantage has been taken of the debtor; at the same time, there is no doubt that, strictly speaking, an expired legal, without a declarator, is good in law. But wherever that is founded upon, the Court sustain the slightest objection to the diligence to reduce it to a security, and even when the diligence is unexceptionable, the idea of the Court is, that an inquiry ought to be made in order to discover whether there has been an exorbitant advantage gained by the creditor. They compare the value of the estate with the amount of the debt: where these are equal, and no advantage arises to the creditor, the subject is declared to belong to him, and his expired legal becomes a right of property. If, on the other hand, they are unequal, and an improper advantage would result to the creditor, then, in equity, the Court cannot declare the property to be in the creditor.

Lord *Dreghorn*—Kaimes, in his principles of equity, says, that an expired legal does not convey the property of the subject adjudged. If the creditor has an action for the recovery of his money after the expiry of the legal, so also ought the debtor to have an action to make it be received, and his land returned to him. That the creditor has such an action is clear; he may even attach the moveables of his debtor by arrestment.

The Lord *President* observed, that this was a question with a coadjudger; there is a difference betwixt the rights of the common debtor and that of a coadjudger. The legal does not expire against coadjudgers. His Lordship said, that it would be proper to establish, as a general rule, that an expired legal, without a declarator, is no more than a right in security of the debt; and even where there is a declarator of the expiry of the legal, that is not effectual against coadjudgers.

Judgement.

The Court adhered to the judgement of the Lord Ordinary; but on advising a reclaiming petition and answers, they ordered the parties to lodge states of the debt, and of the value of the subject; and without pronouncing a judgment, remitted the cause to the Lord Ordinary.

For Purs. R. Cullen,

Def. G. B. Hepburn,

Lord Dreghorn Ordinary.

} Advocates.

T. Scotland, C. S. }

P. Milne,

Sinclair Clerk.

} Agents.

VOL. I. No 3.

VII. JOHN,

ARRESTMENT.

L. JOHN, WALTER, and GEORGE BUCHANANS, Merchants in Glasgow, Claimants;

AGAINST

EDWARD CHIPPINDALE, Trustee on the sequestrated estate of Messrs. LIVESAY, HARGRAVE, and Company, Merchants in Manchester, Objectors.

In an arrestment on a dependente it is not necessary to describe minutely the particulars of the claim, nor the ground of debt, nor are trivial errors in describing these fatal to the diligence, it is sufficient that the amount of the claim be mentioned, and a clear reference made to the depending action.

Livesay, Hargrave, and Company, being Englishmen, and resident in England, the claimants, who were creditors to them, obtained letters of arrestment *ad fundandam jurisdictionem*, on which they laid arrestments in the hands of several of their debtors. They next raised and executed a summons of constitution of their claims; and on this dependance, common letters of arrestment followed, which were executed against the same debtors in whose hands the former arrestments had been used.

CASE
I.

In the arrestment *ad fundandam jurisdictionem*, in the summons of constitution, and in the subsequent letters of arrestment, it is libelled, "That Livesay, Hargrave, and Company are indebted, and resting to the pursuers, the sum of 852 l. 11 s. Sterling, conform to an account of their sundry acceptances.

" One dated 12th March 1788, for	L. 49	17	0
" One dated 4th April 1788, for	173	14	0
" One dated 10th April 1788, for	20	0	0
" One dated 20th of the same month, for	30	15	0
" One of the same date, for	17	10	0
" One of the same date, for	210	15	0
" And another of the same date, for	350	0	0

" Or of whatever other dates, tenor, or contents the same may be, as the said account of bills, and bills themselves, more fully bear."

In the course of the action of constitution, the claimants restricted their demand by excluding the third and fifth articles, amounting to 37 l. 10 s. which left a balance of 815 l. 1 s. Sterling of principal due; and for this, with interest from the time that the bills respectively became payable, decret was given.

D

CASE

I.

given. This decree was produced, as the interest of the claimants in a process of multiplepoinding brought by the debtors of Livesay, Hargrave, and Company, in whose hands the arrestments had been used, and appearance was made for the trustee on the sequestrated estate, who objected to any preference being given on these arrestments.

On the 9th February 1790, the Lord Ordinary pronounced the following judgment. " Having heard parties, procurators, &c. finds the objections not relevant, there being no discrepancy between the bills produced and decerned for, and the description given of them in the summons, on the dependence of which the arrestments were used, as to the sums or any material particulars, (which the dates are not); therefore repels the objections, and prefers the arresting creditors, according to the dates of their arrestments, upon the funds *in medio*," &c. This judgment was brought under review of the Court by the trustee.

Argument for
the Objector.

Nothing can be more dangerous than to depart from a rigid adherence even to the most minute points of form in the execution of legal diligence. Accordingly, the Court has been exceedingly attentive to this matter, as will appear from a variety of cases in the Dictionary, *vide* execution. Thus in the case of Sir John Clerk v. Preston, February 22, 1715—Hay v. Laird of Powrie, July 29, 1680—Gordon v. Duff, 24th June 1707—Gordon v. Graham, February 20, 1680—Rem. Decisions, July 27, 1745—Dunbar v. Creditors of Grangehill.—Every step of diligence ought to state clearly the grounds of debt upon which it proceeds, and every discrepancy ought to be fatal to it. Supposing letters of arrestment to bear, that the obtainer was creditor in a bill accepted by A. they would be good for nothing if it should appear, that instead of A. the bill was drawn upon and accepted by B. In like manner, an error in the amount of the debt must be destructive to the arrestment, because there is no ground of debt of the description given in the letters of arrestment. But, if the objector be well founded in these observations, it follows, that although the error lies in the date of the ground of debt, the diligence is equally objectionable. There is no warrant, there being no more connection between two bills of different dates, than there is between two granted for different sums, or accepted by different persons. Nor is it enough to say, that this objection would not be admitted in a question betwixt the debtor and creditor in a bill. Where creditors are *in damno vitando*, they are intitled to take hold of every flaw to defeat a diligence which is meant to alter the equitable division of the debtor's effects.

The

The same degree of strictness is observed in other cases. A misnomer has saved both the lives and properties of individuals, even errors in orthography are sustained. Of this a remarkable instance happened in the trial of Brodie, where a witness was rejected for a mere misspelling of her surname, though she was clearly pointed out by the designation of Mary, the wife of the said George Smith.

CASE

But it is not in criminal cases only that this strictness is observed; it is equally so in civil cases. An instance occurred in a complaint against an election of Magistrates in one of the burghs in the eastern district of Fife, which was cast from an error in the Christian name of one of the parties against whom it was brought, though he was so designed as to leave no doubt of his being the person meant to be called. And in the late case of Maxwell Campbell against Captain Montgomery, where a *meditatio fuga* warrant being taken out against the defender, on which he was apprehended; the cautioner was freed, on this ground, that the action was described as one presently in dependance, although the summons was not executed until a day or two thereafter.

Supposing, therefore, there was no discrepancy but what arose from the mistake in stating the dates of the bills, the objector would think himself intitled to maintain that it was of itself sufficient to annul the arrestments. But the matter does not rest there, for not only are the bills described only by their dates and sums, but No I. and II. are stated to be acceptances by Messrs. Livesay, Hargrave, Ainslie, Smith, and Hull of London, though now that the bills are produced, they do not appear to be acceptances of these gentlemen. The acceptance is in these terms, "For L. H. and Co. A. Goodrick;" so that the description is not only defective, but is inapplicable. This observation applied to two other of the bills, and certain discrepancies in the dates were pointed out.

The objector has always understood that a summons must distinctly state the claims of the pursuer; and that a full copy must be served on the defender, and the same thing is required in letters of arrestment; there is, therefore, nothing in the saving clause with which the description of the grounds of debt is closed. Blank summonses have been discharged; but to sustain such a clause would be rendering every summons as vague and uncertain as if it were blank.

The objection that some of the bills founded on bear to be acceptances of the bankrupts, and yet appear to be accepted by A. Goodrick, is exceedingly frivolous. Goodrick had a procuration from the house, and he accepted the bills under full authority to bind Messrs. Livesay, Hargrave, &c. The mistake in the dates of some of the bills can be of little moment

Argument for
the Claimants.

C A S E
I.

when the description is, in other respects, so perfect as to leave no uncertainty as to the debts.

It is not disputed that the arrestments were executed in the most regular manner, nor is it pretended that the letters of arrestments do not apply to the summonses; on the contrary, it is admitted, that they tally most exactly. This being the case, there can be no doubt that these arrestments did effectually secure, whatever sums should be contained in any decree to be pronounced in the depending action; therefore, the only question is, whether decree can follow on a summons libelled in the manner which has been followed here.

Now the action has been brought for debts acknowledged to be justly due, the vouchers of which were produced in the course of the action; had the claimants stated in general that a certain sum was due which would be instructed by vouchers, even this would have been sufficiently formal; the summons, in this case, however, went further; for not only is the precise sum libelled, but it is mentioned that this was due on the acceptances of Livesay, Hargrave, and Company, and the precise amount of each acceptance is mentioned. The words, "or of whatever other dates the same may be," would have rendered an amendment of the libel unnecessary to supply the defect in the dates. There can, therefore, be no doubt that the summons is a sufficient warrant for the decree which followed on it.

It is not in consideration of the particular nature of the claim contained in the summons that the warrant for an arrestment on a dependance is granted; it proceeds solely on the circumstance of the summons having been raised, and requires the production of no other warrant. It is, therefore, of no consequence how the grounds of debt are described in the letters of arrestment, it is sufficient that the summons is so described, that there can be no doubt to what action the arrestment refers.

The objector has insisted, that "nothing would be more dangerous than to depart from a strict and rigid adherence, even to the most minute points of form, respecting the execution of legal diligence." But there is truly no question here about the formalities of executing legal diligence, it is not disputed that the arrestments were executed in the most formal and unexceptionable manner; therefore, the decisions quoted by the objector are inapplicable to this case. Solemnities must be strictly observed, otherways they cease to be solemnities; but the description of a debt in a summons is not a solemnity.

There was a similar objection to the interest of William Simpson, cashier to the Royal Bank, attended with this additional circumstance, that the bill pursued on had been indorsed to

to the Bank of England, by whom it had been protested, and had not been reconveyed to the Royal Bank. To this it was answered, that in mercantile practice an indorsation was struck out, and the bill was then considered as standing in the same person with whom it was before the indorsation, and that the protest in this case was taken by the Bank of England as factors for the Royal Bank.

C A S E



The Court adhered to the judgment of the Lord Ordinary, on this ground, that in an arrestment on a depending action it is necessary to state only, that an action is in dependance for a certain sum, without specifying on what vouchers the action proceeds, or the particulars of which the sum is composed. Letters of arrestment proceeding in these terms will secure whatever sum shall be ultimately found due in the depending action.

Opinions.

It was admitted, that an arrestment on a liquid ground of debt was in a different situation, and that then the voucher must be accurately described in the letters in order to render the diligence effectual.

The Lord President, however, was against the judgment, because he thought it improper to admit of any looseness in the forms of diligence. It appeared to his Lordship, that sustaining such an arrestment, as that which has here been objected to, would enable a creditor, who had raised an action in similar terms with the present, in the event of his receiving payment of part of his bills, to substitute others in the place of those which were paid, and so continue the action for debts not originally included in it.

Lord Eskgrove observed, that it was competent to have amended the libel. That the action was brought for the bills which had been produced in the course of the process, and although there had been a mistake in stating the dates of some of the bills, arising from the accident of their not being at hand when the action was raised; yet, from material circumstances, it was clear, that the bills which were produced were those on which the action had originally been founded.

For Claimants, Mat. Rose,	}	Advocates.	J. Foreman, W. S.	}	Agents.
Objectors, Alex. Wight,			A. Young, W. S.		

Lord Dreghorn Ordinary.

Clerk.

Vol. I. No. 7.

BANKRUPT.

I. In the Ranking and Sale of the Estate of DAIL.

DONALD M'MATH Merchant in Inverary, Claimant,

AGAINST

The Trustees and Children of Colonel PATRICK M'KELLAR,
Objector.

I. The detention of the person of a debtor on legal diligence, though for the shortest period, is equivalent to imprisonment, in the question of bankruptcy upon the act 1696.

II. A bond of corroboration by a bankrupt is struck at by the act 1696.

CASE

I.

In the ranking of the creditors of M'Kellar of Dail, there were produced for M'Math the claimant, several grounds of debt by Neill M'Kellar of Dail to David M'Math the claimant's father, and a bond of corroboration by M'Kellar, dated 25th March 1779. This bond included the debts which had been due to the claimant's father, as well as others due to the claimant himself. It contained also debts then due, as well as debts of which the term of payment was not arrived, the principal and interest were accumulated on such debts as were then due, and where diligence had been done, the expence of the diligence was likewise included; where the term of payment had not arrived, there was an obligation for the principal, interest, and a penalty: amongst the debts which were accumulated, and to the payment of which a penalty had been adjoined, there were some which originally had been due by bill. On this obligation an adjudication was led.

The adjudication was objected to on this ground, that the bond of corroboration on which it proceeded fell under the act 1696. c. 5. M'Kellar having been bankrupt when it was granted.

In answer to this objection, the bankruptcy of M'Kellar was denied; and it was contended, that although he had been bankrupt, this was not a deed which would have fallen under the act. There came thus to be two questions.

I. Whether M'Kellar was bankrupt at, or prior to the date of the corroboration, or supposing him to have been at any time bankrupt, whether he had not reconvalesced before granting that deed?

II. Supposing M'Kellar to have been bankrupt at the time of granting the deed, whether it was of such a nature as to fall under the prohibition of the act of parliament?

I. POINT proof of the bankruptcy.

C A S E

I.

In this branch of the cause there were two questions, 1. Whether M'Kellar ever had been bankrupt in terms of the statute? and, 2. Whether, supposing that to have been the case, he had not reconvalesced?

As to the first of these questions, it was not denied that M'Kellar was insolvent, and that diligence by horning and caption had been issued against him prior to the time of granting the deed: But the object of inquiry was, whether he had fallen under the other part of the description; and whether he had ever been imprisoned, or fled from the execution of diligence? On this head, the amount of the proof was, that from the 1773, downwards to the 1779, repeated instances had occurred where creditors had ordered caption to be put in execution against him; that messengers had frequently been looking for him; that he had sometimes got messengers to suspend the execution of the diligence, and sometimes had settled the debt. And in particular, it appeared from the deposition of a messenger, corroborated by his concurrent, and by the notes and books of the men of business concerned, that on the 5th August 1776 M'Kellar was apprehended in the grass-market, and kept a prisoner for a short time until the debt was settled; and that this debt was paid from a loan then negotiated by M'Kellar, and which makes one of the claims in the present ranking. But it did not appear that there was an actual imprisonment, nor was there an execution of the caption in evidence of M'Kellar's having been apprehended. On these facts the question of law was argued.

1. It is not necessary that the debtor shall be actually within the walls of a prison, it is quite sufficient that he has been arrested and detained by a messenger. In the case of the creditors of Woodston in the 1756, it was found "that the debtor having been arrested, and actually in the custody of a messenger upon a caption at the suit of Sir William Ogilvy, was imprisoned in the true intent and meaning of the act of parliament 1696." The principle is clear, it is not the mere circumstance of the messengers being in the presence of the debtor, and telling him his business that is to have the effect of imprisonment under the statute, but it is the arrestment and actual detention, or restraint on the debtor's liberty that is to mark the legal character of bankruptcy. This has been held to be a leading case, it has been followed in that of M'Adam v. M'Ilwraith, 23d November 1771, and in that of Fraser v. Munro, 5th July 1774. Nor is the decision in the case of Maxwell v. Gibb, 17th November 1785, contrary to the principle upon which these other cases have been decided, for these require both apprehension and custody, whereas in Maxwell's case there was apprehension simply.

Argument for
the Objectors.

With

CASE

I.

With regard to the mean of proof, it may be true, that when the execution of a messenger is necessary in order to complete a diligence, the want of the execution cannot be supplied by parole proof. But the question here is simply, whether diligence was used, and which is a fact capable of being established by parole evidence, as it does not attack the validity of the diligence. In many cases it may be impossible to produce the written executions of imprisonment; they may be withheld or destroyed; the creditor is intitled to cancel the diligence, yet the law allows a co-creditor to avail himself of that diligence, and consequently he must be permitted to bring other evidence than what arises from executions which are not within his power, 24th February 1737, Couper.

In many cases there are no executions returned by the messenger, although these cases are held by the statute to be equivalent to imprisonment; and it is in proof, that on these occasions it is not the practice for messengers to return executions. The fact of imprisonment is therefore relevant to be proven, *prout de jure*, creditors of Cleland, 8th July 1705, and July 1783, Young v. Grieve.

2. On the second point, the objectors do not pretend to maintain, that a man once rendered *notour* bankrupt, in terms of this statute, is to retain that character during the rest of his life: but they contend, that he must remain so, as long as he continues insolvent. The principle of the statute 1696 is, that when a debtor falls under the description of that act, he ought not to possess the power of favouring one creditor at the expence of the rest, and this reason must remain while the insolvency continues. The claimants have stated an evil arising from a continuation of the character of bankrupt after it has been once incurred; but this evil is not only entirely imaginary, but was overlooked by the Court in the question betwixt the creditors of Johnston and the creditors of Dirleton, 9th November 1759, as appears from Lord Kaim's report.

If therefore M'Kellar was rendered bankrupt in the 1776, and remained insolvent down to the date of the bond of corroboration in the 1779, the character of bankruptcy, with all its disqualifications remained attached to him. Having once been stamped upon him, it must remain *presumptio juris*, till taken off by contrary evidence, and that evidence must be brought by the claimant.

But to show that M'Kellar was insolvent during the whole of this period, reference was made to states of his affairs made up in the 1776 and 1779, and to a list of hornings, captions, inhibitions, and adjudications from the 1776 to the 1780, at which time, as well as in the 1781, he appears to have been imprisoned.

CASE

Argument for
the Claimants.

1. The evidence in this case proves only that M'Kellar was apprehended by a messenger near Paxton's in the Grass-market; and that he and the messenger walked together up to the Lawn-market, where the concurrent was dismissed and the debt settled; now the claimant submits whether this can be considered as imprisonment in terms of the act 1696. In the case of the creditors of Houston v. Scott of Commiston, the debtor had been detained in *privata custodia*, for a night and part of the next day.

In the case of Maxwell v. Gibb, 17th November 1785, the Court found that the mere apprehending of the debtor, who was immediately dismissed, cannot be construed into imprisonment in terms of the act. In that case there were produced to the Court two executions and two certificates by messengers. The two executions bear that the messenger had "apprehended" the debtor, but had not taken him into custody. One of the certificates bore, that the debtor was apprehended, and afterwards on his promising to settle the debt allowed to go at liberty; the other, that he was apprehended, but recovered his liberty "upon a bond or letter of presentation." These acts, although much stronger than those which occurred here, were not held by the Court to amount to the legal meaning of imprisonment.

Bankruptcy, in terms of the statute, is a fact of the highest importance. If it may be established at any time by the oaths of two witnesses, an alarming opening will be made to fraud; no creditor can be secure: and if it be true that a person may remain in this state for years, the mischief becomes greater, and the necessity for strict legal evidence becomes more urgent. In vain would the law give effect to deeds if they were to be undone by the evidence of a messenger and his concurrent.

The apprehending of a debtor is an *actus legitimus*, and can be proved only by a regular execution. Dict. Vol. II. p. 212. tit. proof, § legal acts.—Forbes's MS. 25th June 1714. Haswell v. the magistrates of Jedburgh.—12th July 1726. Guthrie v. Lord Barnburnoch.

2. Although there should be no doubt as to the imprisonment of M'Kellar, in the proper sense of the word, upon the 5th August 1776, yet for more than two years and a half before granting the bond of corroboration, he was transacting his affairs as usual: it is therefore incumbent on the objectors to show, that the character of notour bankrupt, continued without intermission down to March 1779.

In applying the enactment of the act 1696 to practice, a doubt arose whether it was the intention of the legislature that all the ingredients, constituting bankruptcy, should concur and co-exist at the time of granting the deed under challenge? or whether a person, once brought under the description of a
E bankrupt,

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bankrupt, was to be held as continuing under that description, and subject to its disqualifications all the rest of his life? or if not during life, for what shorter space?

The first time that the question occurred, was in the case of *Lady Rachine v. Henry*, 9th February 1743, when it was the opinion of the Court that all the requisites must concur at the date of the deed. Bankton, B. 1. tit. 10. § 112.

This strict interpretation was not followed by the Court in a subsequent case, 9th November 1750, creditors of *Johnston v. Nisbet of Dirleton*. Kaimes's remarkable decisions, p. 243. Here the Court "considered, that as the common debtor was rendered bankrupt by incarceration in terms of the statute, the few months in which he was allowed his liberty, was no such interruption as to make the posterior surrender of his effects be considered as a second bankruptcy." This however must certainly be understood to have some bounds or limitations; otherwise it would follow, that a man who has once been imprisoned, must continue a notour bankrupt during the rest of his life. In the present case, two years and a half intervened, and if the bankruptcy is to be continued from the one period to the other, it is not easy to see where it is to stop. Payment of the debt on which the diligence proceeded, is held by Erskine to secure against reduction. Erskine's Instit. p. 453. § 42. Kaimes's Rem. Decis. 118.

One thing at least is incumbent on the objectors, they must connect M'Kellar's bankruptcy with the execution of the deed, they ought to prove that he continued insolvent, without intermission, from the one period to the other; and of this there has been no proof.

Opinions.

On this point of the bankruptcy the following opinions were delivered.

The Lord *Justice Clerk* observed, that with regard to the first question, there could be no doubt that M'Kellar was rendered bankrupt in terms of the act. As to the second point, his Lordship said, that when a man becomes bankrupt in terms of the act, he must remain so until his affairs be extricated, and he regain a state of solvency. A creditor who does diligence, and so renders the debtor bankrupt, acts not for himself alone, every other creditor acquires a right, of which he cannot be deprived by the person at whose instance the diligence proceeded. The consequences which follow bankruptcy are pleadable by all the creditors. Were it otherwise very bad effects might ensue; for, supposing a person to have been rendered bankrupt on diligence which proceeded on a trifling debt, and a creditor in a large sum to have purchased up this debt and diligence, this creditor might then dispose of the diligence at pleasure; he might acquire preferences

of constitution; therefore, the question is, whether
 doing an act of justice, without diminishing the
 ment, or retarding the diligence of other creditors,
 such wrong as was meant to be corrected by the

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a bond of corroboration may be said to be a deed
 for further security, in the same way that a bond
 is a security. But this is not the security struck
 ; what is there meant in a security created over
 the bankrupt, which, if not made void, would give
 the creditor a preference.

It may be argued, that although a consequential
 injury to the other creditors from the bond of cor-
 roborations, unless it could be shown, that the same was
 some part of the bankrupt estate, it could not
 be the statutory enactments. Dict. *vide* Bank-
 ruptcy, 28, creditors of Graitney competing. In
 the Court sustained a procuratory granted by
 giving himself heir, and completing his title,
 as to heritable creditors, the argument for
 the validity of the act 1696 was infinitely stronger
 in the present case.

It may further observe, that in the case of al-
 though in bankruptcy innumerable instances occur
 of bills renewed, and the interest
 within the sixty days of the bankruptcy,
 the act 1696. Though it
 is of course known that a document

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“ your of his creditors, either for his satisfaction, or further security, in preference to other creditors, to be void and null.”

It has been said, that this clause strikes against partial preferences only, not against a corroborative security, and that the bond of corroboration gives no preference, it merely enables the claimant to recover his debt. But this argument is in opposition to the act; when a man is bankrupt in terms of the statute, his hands are tied up from doing any deed directly or indirectly in favour of one creditor to the prejudice of another.

The bond of corroboration, though it did not directly convey the effects of the bankrupt, did it indirectly, because it enabled the claimant to proceed, and to claim a larger dividend than he could otherways have drawn.

This question has not been precisely determined, but from the words and spirit of the act, as well as from the analogy of our law, the objectors plea is well founded. The enactment of the statute is analogous to the diligence of inhibition, with this difference, that the inhibition is limited, the act is a general inhibition in favour of all the creditors. Now an inhibition strikes against a bond of corroboration—29th January 1696, *Wilson and Logan v. Penman*—19th June 1782, *Watson v. Marshall*. Erskine, B. II. tit. 11. §. 11. Bankton, B. I. tit. 7 §. 138. And Stair, B. IV. tit. 20. §. 28.

Upon the same principles the Court have decided cases, arising upon the second branch of the statute 1621.—Thus a bill granted by a bankrupt to one of his creditors for the purpose of obtaining a sequestration, which was to cut down partial preferences, was found to be contrary to the statute, as it enabled the creditor to take steps which he could not have done independently of that voluntary deed of the bankrupt. 19th January 1788, *Scott v. Bruce*.

On these grounds the objectors conceived themselves to be well founded in making the challenge.

Argument for
the Claimant.

Before the objectors can avail themselves of the enactment of the statute, they must show, that there is a voluntary deed in favour of a creditor for his satisfaction, or further security in preference to the other creditors. But the deed now challenged does not come under this description; it is a personal bond of corroboration granted by the bankrupt to the son of his creditor, in evidence of a debt indisputably just. By this deed nothing was alienated to the prejudice of the other creditors, nor was any security granted over any part of the bankrupt's estate. The only effect of the corroboration was to save the claimant the expence of a confirmation
and

and decree of constitution; therefore, the question is, whether a bankrupt, doing an act of justice, without diminishing the fund of payment, or retarding the diligence of other creditors, is guilty of such wrong as was meant to be corrected by the act 1696?

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It is true; a bond of corroboration may be said to be a deed for the creditors further security, in the same way that a bond or bill is called a security. But this is not the security struck at by the act; what is there meant in a security created over the estate of the bankrupt, which, if not made void, would give the favoured creditor a preference.

It might further be argued, that although a consequential damage had arisen to the other creditors from the bond of corroboration; yet, unless it could be shown, that the same was an alienation of some part of the bankrupt estate, it could not be brought under the statutory enactments. Dict. *voce* Bankrupt, February 1728, creditors of Graitney competing. In that case, where the Court sustained a procuratory granted by a bankrupt for serving himself heir, and completing his title, which was to accrue to heritable creditors, the argument for applying the remedy of the act 1696 was infinitely stronger than it can be in the present case.

The claimants only further observe, that in the case of almost every mercantile bankruptcy innumerable instances occur of accompts being attested, and bills renewed, and the interest added to the principal, within the sixty days of the bankruptcy, all of which must be reducible on the act 1696. Though it never entered into the head of any lawyer, that a document or personal obligation was itself reducible as a deed in further security of one creditor in preference to the rest.

In short, whether the words or spirit of the act 1696 are considered, the enactment does not affect the interest of the claimant.

The Lord *Justice Clerk* observed, that the debt had been accumulated by the bond of corroboration; but an adjudication, although it would not have done it so quickly, would have done it to a greater amount, and would have included the penalty as well as the interest.

Opinions.

The Lord *President* read the enactment, and remarked, that the creditor might have derived the same advantage from his diligence; but the doubt is, whether the bankrupt can give a voluntary right by which he puts the creditor receiving it in a better situation than the rest?

Lord *Justice Clerk*—We must take the spirit of the act; within sixty days of bankruptcy no debtor can convey any part of his estate, either in extinction or in security of a debt; but he is not prevented from doing common justice. Suppose a
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man is creditor by an open account, he makes a demand on his debtor, who answers, that he has no money; can any thing be more natural than for the creditor to demand a voucher of the debt, and where is the injustice in the debtors granting a voucher? A bankrupt may acknowledge a debt upon oath. If collusion be alledged, a proof of the collusion will be allowed, but if there be no collusion, there is certainly nothing to hinder the bankrupt from establishing the debt in this way, or from giving a document of the debt either in the form of a bill, or by attesting an account. A bond of corroboration cannot fall under the act.

Lord *Eskgrove*—In the narrative of the act, the deeds which a bankrupt is prohibited from granting are described by the term alienation. In the act itself they are called dispositions or assignations, and the general words are “other deeds in “further security,” &c. A bankrupt cannot, therefore, assign a personal bond; such an assignation would be reducible, though a payment in cash is not. It is not meant then by the term “further security,” that the debtor should be prohibited from acknowledging a debt already due, the only intention of the act is to prohibit the bankrupt from granting securities affecting his estate. The law never could be so absurd as to tie up the debtor from acknowledging debts which, by a circuitous and expensive operation, the law itself would render effectual. This bond of corroboration, when considered merely as a constitution of the debt in the person of the heir, cannot be struck at by the act. The only other point is the accumulations; and as it is admitted that by an adjudication this debt would have been accumulated to a much greater extent, the creditors have not been hurt, nor has there been any alienation of the funds; there has been only a constitution of the debt which the law itself would have given.

Lord *Hailes* remarked, that other creditors might also have got bonds of corroboration had they been informed of what was going on; and here lies the distinction betwixt the cases mentioned by the Lord Justice Clerk and Lord *Eskgrove*, of voluntary acknowledgements and legal constitution; the latter give information to every creditor, the former do not.

Lord *Swinton* thought that a person under the description of the statute is civilly dead; that he can do no act by which one creditor may be put in a better situation than another.

The Lord *President*—The act 1696 does not apply to the case where no advantage has been given to the creditor. But does not a bond of corroboration give advantages? The creditor might have procured accumulations by legal diligences; but other creditors would have had an opportunity of doing the same. With respect to the decision, *Scott v. Bruce*, which

which had been mentioned in the pleadings, his Lordship said, that he was unacquainted with the circumstances of it. But if the amount of a former bill with exchange, re-exchange, and charges, were accumulated in a new bill within sixty days of the bankruptcy, he thought the decision wrong; and in so far as the bond of corroboration in the present case enlarges the debt, he considered it to be ineffectual.

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Lord Justice Clerk.—If a bankrupt were to grant a bond of corroboration to one creditor, and to refuse it to another, collusion would be presumed; but this is a debt where the original creditor was dead, and it was necessary, therefore, to constitute it in the person of the heir. There was no other creditor who stood in a similar situation, or who made a similar demand.

“ The Lords having resumed the consideration of this cause, and advised the mutual informations for the parties, with the additional proofs, and exhibits, observations thereon, and notes of authorities, they sustain the objections to the bond of corroboration, as being struck at by the act 1696.”

Judgement.

Nov. 30. 1790.

This judgment was brought under review by a petition for the claimant, in which nearly the same argument was used which had been stated in the information. This petition was appointed to be answered; and on advising the petition and answers, the Court ordered a hearing in presence. What follows are the reasons and authorities founded on by the parties in addition to what was urged in the informations.

The act 1696 was meant to check fraud, and is therefore entitled to a liberal interpretation. By the common law, fraud is a sufficient ground of reduction: But the frauds of bankrupts are not easily detected. It appears, therefore, to have been the object of the legislature to establish by the act 1690 a legal presumption of fraud, which superseding all enquiry into the nature of deeds executed in certain circumstances, was to have the effect of annulling them. The bond of corroboration in question falls under the description of the deeds struck at by this act; it is a voluntary deed, it gives a preference to one creditor over another. In answer to this it has been said, that it is a personal deed, and gives no security which the claimant would not have attained by legal diligence. But this is a mistake; from a state made up by an accountant it appears, that the claimant, had he remained possessed only of his original document of debt, would have ranked for L. 136 less than the sum he claims under the bond of corroboration. This, therefore, is not a mere renewal of a former document, it expressly creates a debt which formerly had no existence. If it does

Additional argument for the Objectors.

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so even to the smallest extent, it falls under the statute, for the Court will not adopt an arbitrary rule of decision drawn from the extent of the preference.

The object of the act is to reduce every deed by which an advantage can be given to one creditor over another; and in this view nothing can be more dangerous than the effects of a bond of corroboration. It is latent, the bankrupt may through it revive debts, he may save them from prescription; but a creditor ought to look to the law alone for the accomplishment of these objects. When a creditor dies, and the debtor grants a bond of corroboration to his heir, that may create a preference, especially if at the same time the debtor refuses to corroborate the debt of another creditor. Many cases may occur to illustrate the advantages which may thus be conferred by a bankrupt; for instance, where there are two creditors by accumulating the debt of the one while the other remains unaccumulated, it may be possible to make the favoured creditor draw a dividend very considerably larger than the other.

Authorities.

There were quoted for the claimant the creditors of *Watson v. Cramond*, July 31, 1724. *Edgar*, and the case February 1728, creditors of *Graitny* competing; these cases are abridged in the Dictionary, Vol. I. *vide* Bankrupt, and Vol. III. But a material distinction betwixt these cases and the present arises from the acts complained of not being voluntary acts, but such as the bankrupt might have been compelled to have granted. Another case which has been founded on is that of *Cowan v. Mansfield*, 7th January 1762. *Fac. Col.* But in this case the debt was not enlarged one shilling by the new bill. The same diligence might have been used upon the old as upon the new bill: indeed, until the term of payment of the new bill, diligence could not have proceeded; and so far the creditor was in a worse situation; and as the new bill was accepted only by the acceptor of the former, it wanted the security of the drawer of the old bill. In this case then it is obvious that the creditors of the bankrupt suffered no loss by the new bill.

There are therefore no cases which bear directly on this point; but there are some, the principles of which support strongly the argument of the objectors. Thus *Scott v. Bruce*, 19th January 1788. *Archibald*, the bankrupt, having fallen in arrears to *Scott* his landlord, a poinding of his effects was executed on the 15th April 1786, not only for arrears covered by the hypothec, but for previous arrears. *Bruce*, a creditor of the bankrupt's, in a bill of L. 60, granted in May 1775. by the bankrupt and his brother jointly, obtained on the 14th April 1786, a new bill by the bankrupt alone, which including interest, amounted to 92l. 7s. On this bill diligence followed, and *Archibald* was rendered bankrupt in terms

terms of law, within thirty days of the poinding. The creditor in this bill attempted a reduction of the poinding on the late bankrupt statute, and the sheriff found that the landlord was entitled to a preference to the extent of the hypothecated rent only. Lord Swinton, before whom this cause came as Ordinary, found that the bill to Bruce of date the 14th April, was granted in fraud of the landlord's prior diligence, and was struck at by the second clause of the act 1621; and to this judgement the Court adhered, and preferred the landlord for his whole debt. Further, bonds of corroboration are struck at by an inhibition, Fountainhall, 29th January 1696, Watson and Logan, v. Penman, and June 1782, Watson v. Marshall; in this last case, Watson's author was creditor to Alcorn, but to avoid the necessity of a confirmation in the person of Watson's author, Alcorn granted a bond of corroboration of the debt; previous to this, however, Marshall had used an inhibition against Alcorn, and in the ranking of Alcorn's creditors, it was objected to Watson's interest, that his author not having obtained confirmation, the debt never had vested: but the Court found, that the corroboration by the debtor afforded a sufficient answer. Marshall then founded on his inhibition, which was prior in date to the bond of corroboration, Stair, B. IV. tit. 20. § 28. B. IV. tit. 50. § 11. Bankton, B. I. tit. 7. § 138. Erskine, B. II. tit. 11. § 11. It was answered, that the inhibition did not strike against the original ground of debt, and the corroboration created no new debt. The Lords found that the inhibition did strike against the bond of corroboration, as serving to create a title to the prejudice of the inhibiting creditor; they therefore sustained the objection. These cases are strongly in favour of the objector's plea, for the effect of an inhibition cannot be stronger than the prohibition of the act 1696. See Sir Geo. McKenzie's observations on that act.

Upon the whole, as every act which gives an advantage to one creditor over another, is struck at by the act, the words, as well as the spirit of the act apply to this case. On the ground of expediency, a judgment cutting down a bond of corroboration, can have no bad effect, since it only tells the public that they are to trust to the law alone, not to the private favour of the bankrupt, whereas to support the deed must open a wide door to fraud.

The effect of the bond of corroboration was to vest without confirmation in the son, the debt which had been due to the father: but the debtor had a title to do so, since he might have legally paid the debt. This deed likewise accumulated the principal and interest, and imposed a penalty on a debt due formerly by bill. It is on these grounds that the objectors have principally founded their plea; and it has been observed, that a man on the eve of bankruptcy stands in a very delicate situation. This is

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is a just remark, the law has been jealous of a person in these unfortunate circumstances, and anxious to prevent the frauds which he might be tempted to commit. There are only three ways in which he can be guilty of a fraud, 1. By embezzeling his funds: 2. By conveying them gratuitously to third parties; and, 3. By conveying them to his creditors in a partial and unjust manner. The first of these is direct fraud at common law, the second is guarded against by the first branch of the act 1621, and the third is the object of the second branch of that act, and of the act 1696. These acts, however, do not divest a man of his property; they form mere restrictions on fraud: where therefore there is no fraud, these laws cannot operate, and the bankrupt remains proprietor of his estate until divested by sequestration. There does not therefore appear to be any ground for preventing a bankrupt from granting a mere document of debt in aid of an antecedent one.

Thus suppose a debtor to be verging to bankruptcy, and a creditor loses his ground of debt; the creditor may no doubt revive it by a proving of the tenor: but is there any thing improper in the debtor's renewing the obligation, and so saving an expence to the creditor; surely it is an act of justice. Or suppose a man to have several personal creditors all entitled to rank *pari passu*, one of them dies, and his heirs has it not in his power to complete his titles, so as to come in *pari passu* with the others: would it be just to prevent the debtor from granting a deed, by which he at once vested the heir of the creditor in the debt, and enabled him to acquire an equal degree of preference? If the act contain such a prohibition, it must be *per incuriam*; for in place of being a fraudulent deed it would be a gross fraud to refuse it. But the words of the act are not inaccurate; they affect cases where there is fraud, but they do not extend to those cases where there is none. This is not a case of fraud.

As to the words of the statute. A bond of corroboration is no doubt a deed, and it is a voluntary deed; before falling under the description of the act, however, it must be shown to be for the security or satisfaction of one creditor in prejudice of the others. But this is not a deed of that nature, it is simply a renewal of a document of debt.

It has been said, that this statute is entitled to a liberal interpretation, as it is directed against fraud. Where fraud appears, the statute ought undoubtedly to reach it; but here there is none. The claimant has received no advantage; no person has suffered any loss. The only change which this bond can produce, is to prevent the creditors from being so unjust as to avail themselves of the death of the claimant's father to postpone his claim.

But besides transferring the debt, it has been said that the bond gave accumulations and penalties, and that the claimant would

would derive an advantage of L. 136.. This, however, is a mistake, the claimant will derive no advantage which he might not have attained without the corroboration; nor is it of any consequence, for suppose a bond to be granted for a debt not due, that case would fall under the act 1621, not under the act 1696, and the claimant must then have proved an onerous cause of granting the deed: if the interest accumulated in the bond were truly due then, that would afford a sufficient defence on that act. The penalty is a mere *ante manum* liquidation of the expences; and in all events, admitting this objection in its full extent; it can go no further than to reduce the bond of corroboration, in so far as it has exceeded the previous document.

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Edgar, 31st July 1724, creditors of Watson v. Cramond, a bankrupt having granted a procuratory for obtaining himself served heir, which service accresced to an heritable security taken previous to the debtor's having completed his title, and which was objected to as establishing a preference in favour of the heritable creditor, whose right without it would have been void. The Lords repelled the objection.

Authorities.

Dict. Vol. I. *voce* Bankrupt, Creditors of Graitney, competing. The same step was taken by the bankrupt in this case, with a view that his title might accresce to certain annualrent-rights which he had previously granted; the same objection was stated, and the same judgment was pronounced: the annualrenters were preferred.

These cases are much stronger than the present, they truly created preferences in favour of the heritable creditors, and had exactly the same effect as if an heritable bond and infestment had been granted at the time of completing the titles.

Fac. Col. 7th January 1762, Cowan v. trustees of Mansfield. William Reid drew a bill upon Williamson for L. 500 payable to William Bruce, Bruce indorsed this bill to James Mansfield, who again indorsed it to Roger Hogg. Williamson, upon whom the bill was drawn, failed before it fell due, and it was returned on Mansfield, who paid the interest, exchange, and charges. Mansfield then demanded reimbursement from Reid and Bruce; and they gave him their joint acceptance on the 2d November 1749, for the contents of the former bill, with interest, re-exchange, and charges, payable one day after date; upon which he gave them a letter, acknowledging the cause of granting the new bill, and promising to deliver up both it and the former bill on receiving payment. This new bill was objected to by Cowan, as being granted within sixty days of the debtor's bankruptcy, and therefore struck at by the act 1696; but the Court preferred Mansfield's trustees, the creditor in the bill. This case is precisely in point,

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and the same reasoning was used by the parties in that case which has been stated in the present.

The case of *Scott v. Bruce* 19th January 1778, has been referred to on the other side, though it proceeds on principles which have little connection with the present case; it was decided on the second branch of the act 1621, and a challenge upon that statute stands upon a quite different footing from one upon the act 1696; for instance a payment within sixty days of bankruptcy is unchallengeable under the act 1696, and yet by the act 1721, a payment would be set aside, if made to the prejudice of more timeous diligence, used by another creditor.

Fountainhall, 29th January 1696, *Watson and Logan, v. Penman*, and June 1682, *Watson v. Marshall*. These are cases where the effect of inhibitions was determined, but the restriction of an inhibition is very different from the restriction of the act 1696. The former creates a preference, the latter is intended to destroy all preferences: a fair onerous debt is struck at by an inhibition; but is not at all affected by the act 1696.

Opinions.

Lord Justice Clerk. Wherever fraud can be discovered, it ought to be corrected. The common law authorises this; the statutes, therefore, are meant rather to define what is fraud, than to confer any new power on the Court. But as, on the one hand, fraudulent deeds are to be cut down; on the other, fair and onerous deeds are to be supported. The acts 1621 and 1696 are excellent laws, but there is no power conferred by these acts which did not exist at common law. Our predecessors, by an act of sederunt, told us what they considered to be a fraud and reducible; the act 1621 is a ratification of this act of sederunt, and, by it, all deeds granted by bankrupts to conjunct and confident persons without value, are held to be fraudulent. There are two kinds of fraud which the law ought to correct, one by which the funds are diminished, and another by which the debts are fraudulently encreased. Before the act 1696 many cases occurred where there was no diminution of the funds, but where suspicious debts were claimed, these were judged of by the act 1621, or by the common law, which, although it did not prohibit onerous deeds in favour of conjunct and confident persons, yet required a proof of the onerosity of such deeds. There was, therefore, no occasion when the act 1696 was enacted to guard against the admission of fraudulent debts, that had been already done; and the object of the act 1696 was to prevent a bankrupt from dilapidating his funds in payment or security of former debts due to favourite creditors: this was a fraud at common law. It is true, payment

ment was held good, because it was the common mode of discharging a debt; but conveying a subject in payment after our bankruptcy was undoubtedly a fraud at common law. It is clear also, from the words of the act, that it was intended to prevent a dilapidation of the funds, not to stop the increase of unjust debts. The expression of "other deeds" has been taken notice of, but where particular deeds have been mentioned, the general expression must be explained so as to comprehend deeds of the same nature only. The act in this view cannot include the acknowledgement of an old debt; this case, therefore, does not fall under the words of the act: But to consider the spirit of it. Is there here any fraud? 1. As to the confirmation. It was in the power of the claimant, in a short time, to have completed his claim by legal diligence against the estate of the bankrupt. It has been said, that the bond of corroboration superceded the necessity of confirmation. Where was the fraud in this? If it merely saved the claimant the expence of the confirmation, there surely was no prejudice to the creditors, and is to be regarded as a commendable deed. If the deed had been granted, and one creditor enabled to proceed directly with diligence, whilst the same indulgence was refused to other creditors who were postponed, it would undoubtedly become fraudulent; but here the bond is payable at a distant term, and no diligence follows upon it for a long time after. 2. As to the accumulations. Let me suppose that a tenant is due rent, on which interest does not run, but he grants a bill to his landlord for the amount; Would you sustain an objection to this bill founded on the act 1696? Surely not: Or a debtor is due the interest on a debt, he grants a bill for this interest to his creditor, this would be equally effectual; the bond of corroboration in this case, in so far as it accumulates the interest, must be in the same situation. The only difficulty arises from considerations in equity; interest is thus, no doubt, made to bear interest.

Lord Swinton said, that although he could not go so far as the Lord Justice Clerk, he had altered his opinion in the circumstances of this case; (read the words of the act;) it says, all deeds in general; it is clear as light, that a bond of corroboration falls under the act, if it be hurtful to creditors: But what is done here? There is undoubtedly a preference of this creditor to the extent of the accumulations; therefore, to this extent it falls directly under the act; but as to the rest, no preference is given. The bond is dated in the 1779, no diligence proceeds on it for a year; had there been no bond granted, the claimant might have had his adjudication as it stands at present. There is something in the case where a favoured creditor

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creditor obtains a bond of this kind, and thereby obtains a preference; it would clearly fall under the act, but that is very different from the present case.

Lord *Monboddo*—The act of parliament says “other deeds,” which certainly includes this bond of corroboration, or any deed by which one creditor can obtain a preference over the rest: here the claimant has gained L. 136 by the accumulations in the bond, to that extent at least, the adjudication ought to be set aside.

Lord *Esqgrove*—The act 1621 was explanatory of the common law, and intended to correct the practice of granting voluntary deeds without cause to confident persons. The second branch of this act secures creditors from being hurt by their debtor whilst in the course of diligence. The act 1696, (which has been well explained by the Lord Justice Clerk) was meant to prevent a bankrupt from dilapidating his funds in payment of particular creditors. It has been said, that a person falling under the description of the act can do no deed which is to affect his property; but this is not the case, he may, for instance, grant bonds either heritable or moveable: Were he rendered incapable by the act, these deeds would be void; but they are only reducible, and reducible only, if gratuitous: for, when the money has been fairly advanced, the security is good. A bankrupt may sell even his heritage at an adequate value, if there be no inhibition; but he never could do this if he were rendered incapable by the act. He may pay off a creditor, or he may grant deeds which he lay under a prior obligation to execute; but all these acts would be null, if a bankrupt were, by the statute, deprived of his power of management, and rendered a mere cypher. In the case of Caves’s creditors, the Court were of opinion that a bankrupt could not transfer his estate, so as to move it out of the reach of the diligence of his onerous creditors; but this is by no means the case here. In the present case there is no conveyance of subjects, there is a mere renewal of a personal obligation. Had it been granted in favour of the original creditor, I should have been more suspicious of the deed, because then there could have been no occasion for it, but to enlarge the debt by accumulating the principal and interest. But here the bond is granted to the heir, for the purpose of saving the expence of confirmation, which seems to be a sufficient reason (if the granter had power, which I think he had,) for supporting it. Nothing can be more just. If the bankrupt’s hands be tied up in this case, there is no possibility of holding, that he may grant a precept, &c. for supplying the title of a creditor, and such creditor would come in, only as he stood at the period of the bankruptcy; but we all know that this is not the case: the only doubt then is with regard to the accumulations. A simple corroboration may be challengeable where it is intended

ed to create a preference ; but every case must be decided on its own circumstances, and here there is not the smallest circumstance of any fraud of this kind. But, with regard to the accumulations, every accumulation of interest not made by law, should be challengeable under the first branch of the act 1621, as a voluntary and gratuitous deed done in prejudice of creditors. But how is the decision in Mansfield's case to be got over ; there is no difference betwixt a new bill for the principal and interest due at the date, and a bond of corroboration, which shall have precisely the same effect. Perhaps the Court in that case were moved by commercial considerations, and if a distinction could be made out betwixt those cases and the present, there would be ground to cut down the gratuitous obligation to pay interest on interest. The objection to the interest applies more strongly to the expences. If the creditor adjudge, the accumulated sum contains a penalty, therefore I am for cutting off the penalty ; and if the decision in Mansfield's case can be got over, the interest also. The adjudication is not an *unicum quid*, which must stand or fall intire.

Lord Justice Clerk said, that he was for cutting off the penalty, and interest charged upon interest : as to the effect of this upon the adjudication, it is clear (if there be no objection to the want of confirmation, and if it shall be thought that the bond of corroboration is otherwise a good ground for the diligence) that it cannot affect it ; an adjudication, it is true, may be cut down on a *pluris petitio* ; but here although the claimant be not entitled to rank for these accumulations in a competition with other creditors, yet if there should be a reversion, they would be good against the bankrupt himself.

Lord Henderland—Though there may be no fraud in this case, yet the bond of corroboration will fall under the act, which cuts down every thing that may be a cover to fraud.

Lord President—The enactment of the statute 1696 is to be explained by its preamble. It is meant to obviate fraud ; it does not say that fraudulent alienations shall be reducible ; this was already done by common law. It declares, that if bankrupts be allowed to do such and such deeds, fraud will arise ; and therefore it lays down a plain rule, that deeds of a certain description are null. The law with regard to nominal and fictitious votes has lately been much canvassed ; had the act for restraining them not pointed out what votes were to be regarded as nominal and fictitious, it would have done nothing ; since the common law reduced all votes which could be proved to be fictitious. The rule laid down by the act 1696 is, that all deeds which may be a cover to fraud shall be null. A bankrupt may grant a bond of corroboration to one creditor and not to another ; and though this may not have been done in the present case (for that would have been direct fraud,

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I.



fraud, and so reducible at common law), yet as it is a dangerous deed, it is reduced on that account by the act 1696. The principle that a bankrupt cannot alter the situation of his creditors, *one iota*, was strongly inculcated in the case of Farms, &c. this was Aylmore's opinion. There was a late case (1), in which a judge, (2) whose opinions will ever be revered, thought "that a bankrupt's hands are tied up; that he can do nothing, and that the creditors must run the race." The very purpose of the act is to supersede all investigation of the nature of the transaction; and, if we do not give this effect to the act, we shall every day have questions of fraud to decide; in the same way that we have had innumerable questions as to the nature of fictitious votes. It were better then for this country to establish a general and unalterable rule.

Judgement of
the Court.

State of the Vote, Adhere or alter.

Adhere, Lords Stonefield, Ankerville, Henderland, Dunfinnan, and Dreghorn.

Alter, Lords Justice Clerk, Elkgrove, Swinton, and Monboddo.—Carried adhere.

For Claimant, D. of Fac. Sol. Gen. Mat. Ross, } Adv. J. M^rNab W.S. } Ag.
Objector, L. Adv. Abercromby, Honyman, } Ja. Ferrier W.S. }

Lord Ankerville Ordinary. Home Clerk.

VOL. I. No. 8.

II. The HEIRS of the deceased ROBERT SELBY, Plumber in Edinburgh, Claimants;

AGAINST

The TRUSTEES on the sequestrated estate of JOHN BROUGH, late Cabinet-maker in Edinburgh, Objectors.

I. An investment in favour of a cautioner, in relief of an engagement for a cash account, where the money was not advanced till after the date of the investment, falls under the act 1696.

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II.



On the 17th June 1788, John Brough obtained a cash credit from Sir William Forbes and Company to the extent of L. 500, on a joint bond granted by him and Robert Selby. Of the same date, John Brough granted to Robert Selby a bond of relief. This deed proceeded on a narrative of the bond of credit, which had been granted to Sir William Forbes and Company, and John Brough thereby bound himself, his heirs, &c. "to free, relieve, harmless, and skaithless keep the said Robert Selby, his heirs, &c. of and from payment of the contents of the bond of credit above mentioned, or any part thereof, and of all costs, skaith, dama-

(1) See Retention Cases in this Collection.

(2) Lord Justice Clerk (Macqueen.)

"ges,

“ get, and expences, which he and they may be put to by and
 “ thro’ his having become bound as cautioner for me in man-
 “ ner foresaid; and, for that effect, to deliver up the said bond
 “ cancelled, or to report a valid discharge thereof, duly regi-
 “ stered, to the said Robert Selby, against Whitsunday next,
 “ or sooner if required: and for the said Robert Selby his fur-
 “ ther security and relief of the payment of the foresaid
 “ sums,” the said John Brough sold to him or his heirs, &c.
 a tenement of land in the Extended Royalty of Edinburgh.
 The deed contains an obligation to infest the disponent either
 by resignation or conformation, or by both; a clause of war-
 randice and an assignation to the rents that the disponent might
 “ apply the same towards payment of the sums before writ-
 “ ten.” Infestment was taken on this disposition the same
 day that the deed was granted, and was recorded on the 28th
 July thereafter.

John Brough continued to use this credit for five years,
 when, in the beginning of the 1788, his affairs having gone
 into disorder, a sequestration was awarded against him. It
 now appeared that Brough had exhausted his credit, and that,
 on the 9th June 1789, he was due to Sir William Forbes and
 Company, on Selby’s joint bond, 539 l. 12 s. 5 d. Sterling.
 Selby accordingly paid up this sum, and claimed a preference
 for it under the infestment in relief:

To this claim it was objected by the trustees, “ That the
 “ feisin on the bond of relief is dated *simul ac semel* with the
 “ obligation to Sir William Forbes and Company, and before
 “ any operation was made on the cash account; the secu-
 “ rity being therefore clearly granted, for relief of a debt
 “ to be contracted, it is struck at in terms of the act
 “ 1696.”

This objection, with answers, &c. having come before
 Lord Dreghorn as Ordinary, his Lordship pronounced the fol-
 lowing judgement—“ The Lord Ordinary having considered
 “ these objections, with the answers, replies, duplies, and
 “ bond of relief, particularly that in said bond John Brough,
 “ the principal debtor, is bound to relieve free and harmless,
 “ keep Robert Selby, the cautioner, from the payment of the
 “ contents of the bond of credit, and, for that effect, to de-
 “ liver it up to him cancelled, or report a valid discharge
 “ thereof, duly registered, against the term of Whitsunday
 “ then next, repels the objection.” Against this judgement a
 reclaiming petition was presented for the objectors.

By the common law of this country an infestment, granted
 for security of money, cannot be effectual, further than to the
 extent of the money then advanced. The carrying it further
 would, in fact, be giving a security for a debt that did not
 exist;

Argument for
the Objectors.

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exist; yet a security seems necessarily to imply an already existing debt; even before the act 1696 infestments for security of debts to be contracted, never were sustained in competitions with other creditors.

The question betwixt M'Dowal of Freuch and Sir John Rutherford, decided on the 19th Feb. 1715, as proceeding on the principles of the common law, (the security on which the question arose having been granted prior to the act 1696) establishes this principle, that a real security never can become broader or more extensive than it was at the moment when seisin was taken.

Such was the principle of the common law; but to guard against the frauds which might arise from sustaining securities for future debts, the statute 1696 was enacted, by which it is declared, "That any disposition or other rights that shall be granted for hereafter, *for relief or security of debts to be contracted for the future, shall be of no force as to any such debts that shall be found to be contracted after the seisin or infestment following on the said disposition or right,*" &c.

To this just and salutary enactment the Court have, on every occasion, given the utmost force and effect. Thus in a case abridged in the Dict. Vol. III. p. 384. Rem. Decis. and Falconer. June 13. 1750, Lady Kinloch v. Dempster. The case of Pickering v. Smith, decided 16th January 1788—Newenham, Everet, and Company, v. the Creditors of Stein, 1789. All these different cases show how uniformly the Court have decided on the principles of common law, confirmed by the enactments of the statute 1696.

The historical account of the act can have no influence on the interpretation to be given to that act, the words of which are perfectly general, and intended to prevent every possible future evil, independent of Sir John Cockburn of Langton's case, or of any particular case whatever. In the decisions of Pickering and Smith, and of Newenham and Everet, the same conjectural history of the statute has been given; but the judges were of opinion, that if the law were to be explained and qualified by such circumstances, every thing would be left arbitrary, and there would be an end of the statute altogether: it was impossible to figure the various evils which might result from supporting infestments for future debts; and the only wise and safe course was to give uniform effect to the precise and expressive words of the legislature.

Further, in answer to what has been stated for the claimants, it was observed, that although there was no fraud in this case, neither had there been any in the case of Pickering, nor in that of Newenham and Everet; in both of these cases, as in the present, the argument had turned on the effect of a cautionary obligation.

Every

Every cautionary obligation must be precisely of the same extent with the principal obligation to which it is accessory; and neither the one nor the other can be broader than the extent of the debt at the date of the infestment; therefore, the only question is, What was the amount of the debt due by Brough to Sir William Forbes and Company, at the date of Selby's infestment? To suppose that the infestment can secure more, is to maintain that the act of parliament is to be of no avail, and that henceforth an infestment is to secure debts contracted after the date of the seisin.

It has been said, that by the terms of the bond of relief, Brough was bound to relieve the cautioner from the obligation he had come under, and to deliver up the bond cancelled; and the infestment being granted in security of this obligation, it must be effectual till that was fulfilled. But the same may with equal force be applied to the case of a cash credit, the obligation is equally strong. But the Court have found that such an infestment extended no further than to the sums advanced at its date; and if the security could be no broader in the original obligation, there is no good reason why the accessory one should be in a better situation.

It has been further said, that the security in question was granted for a limited, and not for an indefinite sum. But this does not take the case out of the act 1696, a sum may be specified so large as to cover every future contraction. In this way an universal hypothec may be constituted in favour of a confidential person, which would necessarily lead to all those evils which it is the object of the act of parliament to prevent.

The claimants founded on the decision in the recent case of Sir George Abercromby against the creditors of Durn: But that case was attended with peculiar circumstances; (See note on case III.) the advances, though made posterior to the date of the heritable security were previous to the actual delivery; and it was on that ground that they were sustained.

If the objector's argument be well founded, it is impossible by the law of Scotland, to grant an heritable security in relief of a cautionary obligation for credit on a cash account. In like manner, it must be admitted that a cautioner for a person holding an office, where it is necessary to find security to the public, cannot effectually obtain an infestment for relief from the principal debtor. Such being the consequences of the doctrine maintained by the objectors, the Court will be disposed to consider the case well before any judgment be pronounced, tending to establish a rule so inexpedient, and apparently so unjust.

Argument for
the Claimants.

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The argument of the objectors resolves into two points, 1st, That the objection ought to be sustained at common law : 2d, That allowing the security to be good at common law, it falls under the express enactment of the act 1696.

So far as the argument is founded on the common law, there is no room even for a doubt on the point. The claimant, as cautioner for Brough came under a legal, a valid, and an effectual obligation to Sir William Forbes and Company; and so far from being restrained, Brough, on the plain and obvious principles of justice was bound to secure Selby from sustaining any loss.

The case of Sir John Rutherford was determined on the common law. But it is an authority which supports and illustrates the plea of the claimant, on both the points stated by the objectors. The security obtained by Sir John Rutherford, was precisely that species of security which prior to 1696 was common in Scotland, and was then understood to be good in law; such securities were found by experience to be the cover of fraud, and of that a striking instance occurred in the case in question. But in the present case, how have the creditors of Brough been injured? They are gainers by the credit obtained from Sir William Forbes and Company; by that he was enabled to build those houses, the prices of which will now be applied in payment of his debt. Brough was therefore bound in justice to relieve his cautioner. At common law then there is not a doubt that the security obtained by Selby was in every respect most unexceptionable.

As to the object of the statute 1696, the granting securities for cash credits, was not the evil intended to be removed by that statute. Cash credits were not then known: the evil intended to be removed had often presented itself to the Court. It was customary at that time to charge lands not only with a definite sum, but in general with all debts which might thereafter be due to the granter, and to relieve him of all engagements he might afterwards come under for the granter. There was an instance of the fraud arising from this species of security in the case of Sir John Rutherford; and it is generally understood that a glaring instance of the same species of fraud was the occasion of passing the act 1696. From the terms of that act which are quoted, it is said that the intention of the statute was to put an end to that style of securities, at least to limit the operation by the date of the infestment.

In the present instance, the objectors are attempting to extend the enactment of the statute to a case which the legislation neither had nor could possibly have in view, and where it would be detrimental to the interest of the country to give effect to the act. Cash credits are necessary to traders: what-
ever

Brough had no right whatever; but the disposition which has been granted is a disposition in security only.

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Lord *President*—In the case of Everete there were two grounds on which the security was set aside; 1st, Because the extent of the obligation was indefinite; 2d, Because it was an obligation for a future debt. But, independent of that case, there is the decision in the question betwixt the bank of England and the creditors of Alexander, where this very question occurred. Heritable security had been given for a cash account; and so far as money had been drawn out at the date of the infestment, the security was held to be effectual; but, as to the sums drawn out after that period, it was not. See also Pickering's case. If the principal obligation cannot be secured by an heritable infestment, neither can the cautionary obligation. The cautionary obligation is an accessory which must follow the principal, and can be in no better situation. The words of the act are, "Relief of an engagement;" how can we get over these?

State of the vote, "Adhere or alter."

Judgement.

Lord Dreghorn voted, Adhere. The rest of the Court were for altering; and accordingly the following judgement was pronounced:

"The Lords having advised this petition, with the answers thereto, they find that the heirs of the deceased Robert Selby are only preferable in virtue of his infestment, for the sums they can instruct to have been advanced by the said Sir William Forbes and Company to the said John Brough at the date of the said infestment. and remit to the Lord

C A S E.

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enham and Everet, the question was not with a cautioner for a cash credit. In these cases, particularly in Newenham and Everet's, the point was considered as extremely doubtful, both on the bench and at the bar; and is now under appeal.

This is the substance of the pleadings urged for either party on the general question. But besides this, there was the following circumstance stated for the claimants; that on the 17th June 1783, when infestment was taken in favour of Selby, Sir William Forbes and Company were in advance for Brough 402 l. 16 s. which, with interest charged as usual in such cases, would amount to somewhat more than the sum of 539 l. 12 s. 5 d. now in question. From this it was inferred, that the whole debt had been advanced *previous* to the date of the infestment. But the effect of this was understood to be taken off by the following explanation. The sum of 404 l. 16 s. due on the 17th June 1783, was not contracted on the bond of credit, it was advanced to Brough on the credit of a good bill, previously deposited with Sir William Forbes and Company: it was a balance arising on a deposit account. And on this view of the matter the cause came to be decided on the general question, when the judges delivered the following opinions.

Opinions.

Lord *Justice Clerk*.—His Lordship said that he was clearly against the interlocutor. An infestment in security of a cash credit extends no further than to secure the money advanced at the date of the infestment.

Lord *Dreghorn*.—This case differs from that of an heritable security granted in relief of a cash account. The act of parliament does not seem to apply to the present case. The principal is taken to perform a certain act; he obliges himself to deliver up the bond of caution cancelled. It is an act for the performance of which he may grant an heritable security, with equal propriety as for the performance of any other act. Unless therefore it be said that a person cannot grant an heritable security *ad factum prestandum*, it must be allowed that the security in the present case is competent.

Lord *Eskgrove*.—Had it not been ascertained by a decision of this Court, that an heritable security in the present form could not be effectually given for a cash account, it would have been necessary to have tried that as a preliminary question. But this point has been already ascertained; and there seems to be no circumstance by which the present case can be distinguished from that one; a different decision here would be in effect to overturn the former decision, since by this mode an heritable security might be taken on a cash account. There might have been difficulty had this been an absolute disposition, where every person must have seen from the record that

Brough

Brough had no right whatever; but the disposition which has been granted is a disposition in security only.

Lord *President*—In the case of Everete there were two grounds on which the security was set aside; 1st, Because the extent of the obligation was indefinite; 2d, Because it was an obligation for a future debt. But, independent of that case, there is the decision in the question betwixt the bank of England and the creditors of Alexander, where this very question occurred. Heritable security had been given for a cash account; and so far as money had been drawn out at the date of the infestment, the security was held to be effectual; but, as to the sums drawn out after that period, it was not. See also Pickering's case. If the principal obligation cannot be secured by an heritable infestment, neither can the cautionary obligation. The cautionary obligation is an accessory which must follow the principal, and can be in no better situation. The words of the act are, "Relief of an engagement;" how can we get over these?

State of the vote, "Adhere or alter."

Judgement.

Lord Dreghorn voted, Adhere. The rest of the Court were for altering; and accordingly the following judgement was pronounced:

"The Lords having advised this petition, with the answers Mar. 2, 1791.
"thereto, they find that the heirs of the deceased Robert Selby are only preferable in virtue of his infestment, for the sums they can instruct to have been advanced by the said Sir William Forbes and Company to the said John Brough at the date of the said infestment, and remit to the Lord Dreghorn Ordinary, &c."

II. Where a person has a bank credit, a cautioner interposing his security to the bank, is liable for what had been advanced prior as well as posterior to the bond of credit.

The cause being thus remitted to the Lord Ordinary, his Lordship, after having examined into the fact, pronounced the following interlocutor: "The Lord Ordinary having considered this condescendence, with answers, replies, duplies, July 9, 1791.
"and accounts therein referred to, finds, that although, in virtue of the general obligation, in the bond of credit granted by the late Robert Selby, along with John Brough, to Sir William Forbes, James Hunter and Company, 17th June 1783, the representatives of Robert Selby may be liable for the balance due by Brough on said day to said Company on the previous deposit account he had with them; yet the said representatives cannot claim any preference in
"virtue.

CASE

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“ virtue of the infestment taken on said day on the bond of
 “ relief granted by Brough to Selby, also on said day, in re-
 “ spect no sums had been advanced by the said Company to
 “ Brough at the date of the said infestment in consequence
 “ of the said bond of credit, and that it was only such ad-
 “ vances that were in question before the Court at pronoun-
 “ cing, and must be understood to be meant in the interlocu-
 “ tor 2d March last.”

Argument for
the Claimant.

Against this judgement the claimant presented a petition, in which the following argument was maintained. So far as Brough owed one shilling to Sir William Forbes and Company at the date of the infestment, for which Selby was liable; to that extent, the heritable security in favour of Selby must be effectual; but if, at the date of the infestment nothing was due for which Mr. Selby could be made liable, then Mr. Selby's heirs have no occasion to found on the infestment: that in this view of the matter it came to be a question of fact rather than of law.

With regard to the fact.—In October 1781 Brough obtained a cash account from Sir William Forbes and Company. The transactions under this account, and the settlement of it, went on in the common course of business till the 17th June 1783, at which time there was a balance due by Brough of 402 l. 16 s. and it was at this period that Mr. Selby joined in the bond for L. 500. On this occasion no new account was opened; the former one was carried on to the common period of settlement, when there was a balance against Brough of 186 l. 11 s. 9 d. carried to new account. In this way the transactions under this account proceeded at the settlement on the 30th June 1784, the balance against Brough was 206 l. 15 s. 8 d.; and in an intermediate period, viz. 6th August 1780, Brough's debt had been entirely paid off, and there was due him a few shillings on the cash account. At the period of Brough's bankruptcy, however, the balance had arisen to upwards of L. 500 Sterling.

Thus there was no deposit account; the account had been begun and carried on in the same way. When bills were deposited with the Company, they never entered the account until they were paid. As Selby was not merely bound for what should be advanced, but for every sum in which Brough should be indebted to the Company to the extent of L. 500, it was evident he was liable for the balance of L. 402 due at the date of his bond, and of consequence that the heritable security in relief must be effectual.

Argument for
the Objectors.

To this it was answered, that the prior advances were made on a deposit account; that good bills had been deposited with the

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the Company, and that it was in virtue of that deposit that Brough had been allowed to draw: these previous debts never can come under the bond of credit which relates entirely to future contractions: it was an account, to be kept, for which Mr. Selby became liable. Thus the true question for the Court to decide, is, whether, on the supposition that no draught had ever been made under the new account, in short, that nothing further had happened than Selby's granting his bond, he would have been liable for the previous contraction of L. 402; and the objectors holding that he would not, they maintained that, at the date of the infestment, no part of the debt was due, in relief of which the heritable security had been granted.

The following opinions were delivered on advising this petition and answers.

Lord *Eskgrove*—The former judgement pronounced by the Court was founded on a just construction of the act of parliament. The meaning of the transaction betwixt the parties was this, on the one hand, the claimant became liable for such sums as had been advanced to Mr. Brough previous to the date of the obligation, as well as for such sums as should be advanced after that period; and, on the other hand, the claimant was to receive from Brough an heritable security, in relief of such sums as he should be found liable for, in terms of that obligation. Now, what I desiderate upon is this, how shall this man be subjected to a debt due *ab ante* in virtue of his obligation, and yet at the same time be denied relief on his heritable security, which was intended to meet this obligation? If the sum advanced to Brough by Sir William Forbes and Company, previous to the date of the infestment of relief, be brought into the account, for which Selby is liable; why should he not have his relief? Suppose at the time of entering into this transaction Selby had been told, that, in consequence of the obligation he was signing to Sir William Forbes and Company, he would be liable for every halfpenny which had been advanced to Brough, as well as for what should be advanced after that period; while at the same time the infestment in relief, which he was then receiving, would not cover these advances, he never would have signed the bond. If the amount of this previous advance be thrown out of the question, I have no objection to subscribe to every word of the interlocutor. The meaning of the security is, that as the claimant was liable for every thing then advanced, as well as for what should thereafter be advanced; the security was to be of equal extent: and on that I desiderate. I think the claimant entitled to relief of whatever sums were advanced prior to the date of the infestment.

Opinions.

H

Lord

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Lord Swinton—I attend chiefly to what was *actum et tractatum* betwixt the parties; and as the infestment in relief must commensurate the original obligation, the only question is, To what extent was the claimant bound? It appeared then from the original obligation, that he was bound jointly with Brough to repay to Sir William Forbes and Company the sum of L. 500 Sterling, or such part or parts thereof as shall appear to be due on the said current account; and had the obligation gone no further, it might have been doubted whether the claimant would have been liable for what had been previously advanced; but the obligation goes on in these words: “Or to repay to them such sums as the said Sir William Forbes and Company shall stand engaged for, on account of the said John Brough, by accepted bills, letters of credit on foreign places, guarantees, or in any other manner of way whatsoever, not exceeding in all the said sum of L. 500 Sterling.” In terms of this obligation, Selby was bound to repay such bills as were at that moment in the hands of Sir William Forbes and Company: suppose Lord Buchan’s bill and the other to have been good for nothing, the claimant must have made these debts good; and if this be the extent of the claimant’s obligation, the obligation of relief must be equally extensive. Besides, these very bills were brought to Brough’s credit in the account with the Company. On these grounds I am for altering the Lord Ordinary’s judgment.

Lord Dregburn—The debt due by Brough to Sir William Forbes and Company, prior to the date of Mr. Selby’s obligation, has no connection with the debt due posterior to the date of that obligation. They are separate accounts altogether, and they stand upon securities perfectly separate and distinct. There is no reference in the bond to the debt contracted previous to its date, and the argument for the objectors is, that the claimant is liable only for what was contracted after the date of the bond.

Lord President—I was formerly of opinion with Lord Swinton and Lord Eskgrove, and I continue to be so still. There was no deposit account; there was no account separate from the cash account; it was one account from first to last. The person who receives an account of this nature, draws out money as he has occasion for it, and repays it when it is convenient for himself. So stood the account in question when the claimant became bound, and there was no change made on that occasion. Previously to the claimant’s becoming bound, Sir William Forbes and Company had no security but what arose from Lord Buchan and Miss Crawford’s bills; so far as these bills went, Sir William had a security, and when paid, their amount would have been placed to Brough’s credit. When

When matters were on this footing, it is not to be supposed that Sir William would have advanced more than the value of the bills which he held; if he went beyond that, he no doubt trusted to Brough's personal credit, and when he demanded a further security, that did not render it a new account. It appears, that Brough had occasion to draw money, and that Sir William Forbes and Company had agreed to advance him sums when his occasions required it, to the extent of the bills, which Mr. Brough at that time deposited with the Company; and even this sum was over-drawn by Mr. Brough. It was in Sir William's power at this time to have demanded the money, and to have forced payment of it from Brough; in place of this, however, it would seem he had demanded only an additional security: and, accordingly, Mr Selby became bound to Sir William Forbes for whatever advances he should make to Brough, and for whatever debts should be due by Brough to him, in whatever way they might be constituted, to the extent of L. 500 Sterling; it was reasonable in this situation of matters, that Selby should be relieved of the obligations he had come under: and, accordingly, Brough granted him an heritable bond of relief. Now this would be an extraordinary security if you should find that it was not good for future advances, (which you must do in conformity with the act 1696;) while, at the same time, you found it was not good for sums which had been previously advanced. I cannot suppose that the parties meant to enter into an engagement which should be good for nothing; you cannot give such an interpretation to it; you meant no such thing by the judgement you pronounced; the word deposit has crept into the argument and into the interlocutor, but there was no deposit account in this case. Should your Lordships, however, be of a contrary opinion, we must allow Sir William Forbes and Company to be heard; for if the obligation be not an effectual one for the previous advances, then Selby is not bound to Sir William Forbes and Company; or, if the obligation is effectual, then the heritable bond of relief must be effectual also.

Lord Dregborn—Suppose I have an account with a bank, and am due a balance on that account, I then procure a cautioner for money to be advanced, Will that cautioner be liable for what was due previous to his entering into the cautionary obligation?

Lord President—Surely; there are not two accounts; there is only one, and it is the balance on that account for which the cautioner is liable.

Lord Justice Clerk—My opinion differs from the judgement which has been given by the Court. I do not found it on any thing I have heard, nor on any thing which has been stated in the papers. I am of opinion, that the claimant, in terms of

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II.

his cautionary engagement, was liable for what was due *ab ante*, as well as for after contractions; but my doubt is what ought to be the effect of the heritable security in relief, given by Brough to the claimant. The bond by Selby to Sir William Forbes and Company was granted in the 1783, and the purpose of it was to secure that Company for the cash account they had given to Brough. The effect of a cash account is to enable the person to whom it is given to draw out money whenever he thinks proper, and when he is in cash he replaces these drafts; and, generally speaking, a settlement takes place once a year, and with private banks twice a year. This obligation, therefore, is of a transitory and fluctuating nature: at the beginning of the cash credit, the whole sum may be drawn out, of the same date with the investment; and if there be no more transactions on that account, no payments to the credit of this advance, then my opinion is, that the heritable bond of relief would be an effectual security. In the present case, however, I have a difficulty, arising from this circumstance, that the debt due to Sir William Forbes and Co. on Selby's bond varied; one year the balance was more, another less: the balance, whatever it was, no doubt was due by Brough and his cautioner, but the prior advances were evidently paid off; and although the obligees were liable for new contractions, yet, as contractions posterior to the date of the investment, are struck at by the act 1696, this security can give the claimant no relief. This objection is founded not only on the act of parliament, but in the nature of the feudal law: An investment is not a right of that kind that can dance backwards and forwards, as the balance of an account current may happen to vary, if there be a debt at the date of the investment, every posterior advance is so far an extinction of that debt: competing creditors might plead on such a payment; now if the debt be once extinguished, How can we rear up the investment of relief? It is inconsistent with the feudal law; an investment, without money advanced, or after that money has been repaid, is a mere shadow without a substance. In practice, the banks do not give a cash credit on an heritable security; the public banks do not; private banks perhaps may; but it is understood in the national bank, that a bank credit is inconsistent with the nature of an investment, which cannot dance backwards and forwards as the balance of the account may chance to fluctuate. I do not, therefore, agree with the interlocutor of the Court in the terms that it has been pronounced; for if the money was advanced, and not afterwards repaid, I should think an heritable security in that situation effectual; but if from after transactions it appear, that the original advance had been repaid, I should be of a contrary opinion.

Lord

Lord Monboddo—I am of the opinion delivered by the Lord Justice Clerk; I wish to hear an answer to it.

Lord President—This is not a new argument; a similar question occurred in the case of Mr. Pultney, in the ranking of Alexanders' creditors, where the security was found effectual for the ultimate balance, notwithstanding a variety of intermediate transactions. A balance is due at the date of the infestment; I shall say a sum is paid in next week, but is this to be considered as a re-payment, when it is drawn out again, the week following: it is a plausible argument to say an infestment must not dance backwards and forwards; but are you to alter the original advance every time that a sum is paid in or drawn out on the cash account.

Lord Justice Clerk—His Lordship said, that in his opinion Pultney's was a different case from the present.

Lord President—If this new point is to be taken up, I have no objection to it, but let it be done in a regular manner; it has not been argued upon by the counsel, and the Court is not prepared to decide upon it.

Lord Eskgrove—I remember the case perfectly well. What comes of the obligation to repay, after the L. 500 is advanced? It is not to be affected by after transactions until an ultimate settlement takes place, and if then, at that ultimate settlement, the debt be not wholly extinguished, the obligees must be liable.

Lord President—We are going into a point which does not occur in this cause, for at no period of the currency of the account was the balance diminished.

Cullen—Shews, from the papers, that there was a period at which the balance was greatly diminished.

Lord Justice Clerk—His Lordship still thought that Pultney's case was decided on a different ground. The best lawyers were at that time consulted, and they fairly owned that they could not devise a method by which it was possible to give an heritable security for a bank credit.

“ The Lords alter the Lord Ordinary's interlocutor now
 “ brought under review; and find, That John Brough did, up-
 “ on the 17th June 1783, owe to Sir William Forbes and
 “ Company the sum of 402 l. 16 s. Sterling, upon a current
 “ account; and that Robert Selby (claimant) having, in con-
 “ sequence of the bond of credit then subscribed by him and
 “ the said John Brough, become chargeable with the said sum;
 “ therefore, the sum must be understood to have been cover-
 “ ed by the infestment taken next day upon the bond of relief
 “ granted to him by the said John Brough; but remit to the
 “ Lord Ordinary, before further procedure, to hear parties
 “ upon this point, Whether the subsequent operations of the
 “ said

Judgement.
June 27. 1792.

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“ said John Brough, in drawing out or paying in money to Sir
 “ William Forbes and Company, ought to have the effect of
 “ extinguishing or diminishing the preference competent to the
 “ heirs of the said Robert Selby (claimant) under the said in-
 “ feftment.”

For Claimant, Cullen,
 Creditors; Abercromby,

} Advocates.

J. Jolly, C. S. } Agents
 J. Bremner, }

Lord Dreghorn, Ordinary.

Mitchelson Clerk.

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III. ROBERT and HENRY DRUMMONDS, Bankers in
 London, Claimants,

AGAINST

Sir ARCHIBALD CAMPBELL and others, Creditors of Sir JAMES
 COCKBURN of Langton, Objectors.

An absolute and irredeemable disposition, qualified by a back bond, which declared
 the subject redeemable on payment of a debt contracted partly before the date
 of the disposition, and partly of the same date with the recording of the in-
 feftment following on the disposition; held to be effectual, and not to fall under
 the act 1696.

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Mr. Stewart agreed to advance to Sir James Cockburn the
 sum of L. 4400 Sterling, on a conveyance to the heritable of-
 fice of usher, and to the lands of Birgham. The disposition was
 to be absolute, qualified by a back-bond. Accordingly, on the
 9th of May 1777, Mr. Stewart advanced to Sir James Cockburn
 L. 3000 of the money for which Sir James granted his bond in
 the English form; and on the day following, an absolute dispo-
 sition of the said subjects was executed in favours of Mr. Stewart.
 Of the same date with the disposition, Mr. Stewart gave his
 missive, obliging himself to execute such a deed as Andrew
 Stewart, Esq; should direct, for reconveying the subjects, on
 payment of the money advanced in virtue of the disposition. Mr.
 Stewart was infeft in the office of heritable usher on the 3d of
 June 1777, and in the lands on the 4th, on the 7th of the same
 month the sasine was duly recorded. On the last of these dates,
 that is, on the 7th, when the sasine was put on record, the re-
 maining L. 1400, which completed the sum of L. 4400 was ad-
 vanced, for which L. 4400 Sir James Cockburn granted his bond.

June 24.

Of this date, Mr. Stewart, as had been agreed upon, grant-
 ed a formal back-bond to Sir James Cockburn. This deed
 narrates the transaction, the absolute disposition, and the bonds
 which had been granted by Sir James; it then acknowledges,
 that the disposition, though conceived in terms of an absolute
 and irredeemable conveyance, was granted merely in security
 of

of the two sums of L. 3000 and L. 1400 Sterling; and that the subjects stood vested in him only as an additional security to enable him to operate his payment. He obliges himself on receiving payment of principal, interest, and expences, to denude, and to reconvey the subjects to Sir James; and in the mean time to account for their produce. It is declared that Mr. Stewart shall have liberty to sell, and he obliges himself to account to Sir James for the price. This back bond was recorded in the register of sasines on the 30th June 1777.

Sir James Cockburn's affairs having gone into disorder, and his estate being brought to a sale; Messrs. Drummonds, who had acquired right to Mr. Stewart's debt, produced as an interest, the above absolute disposition and infeftment in Mr. Stewart's favour, and a conveyance of them to the claimants. To this interest it was objected by the common agents, that from the conveyance from Mr. Stewart to Messrs Drummonds, and also from the back bond, it appeared that the disposition by Sir James Cockburn was granted as an additional security for the sum of L. 3000, and for the sum of L. 1400 Sterling, and that this last sum having been advanced, after the date of Mr. Stewart's infeftment, it fell under the act 1696, c. 5. By which all infeftments for posterior debts are declared to be ineffectual.

This point came before the Lord Ordinary; on objections, answers, and replies, when his Lordship found, "That the
Nov. 27. 1790.
" disposition granted by Sir James Cockburn to Mr. Stewart,
" and the infeftment following thereon, though *ex facie* absolute and irredeemable, are instructed by the relative proviso and back bond, to have been truly granted for security of money advanced by Mr. Stewart to Sir James, partly prior and partly posterior to the date of the infeftment:
" Found that in a question with Sir James Cockburn's other creditors, the said disposition, in so far as granted in security of a debt contracted after the date of the infeftment, is by the act 1696, ineffectual and of no force; therefore sustained the objection to the interest produced, and preference claimed for Messrs. Drummond, as standing in the right of Mr. Stewart, in so far as respects the sum of L. 1400, being the money advanced after the date of the infeftment."
This judgment was brought under the review of the Court by the claimants.

The object of the act 1696 was to regulate and ascertain the effect of a particular species of security common in Scotland at that period. The nature of that security appears from Lord Stair, B. II. tit. 3. § 27. and from the decision in the case of Inglis, 26th June 1677, collected by Lord Stair. These securities covered not only the debts due at the date of the deed, but all debts which the granter might thereafter happen to
owe

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owe to the receiver. Or they relieved the receiver of all engagements he might thereafter come under for the granter: Such securities enabled the holder to rear up fictitious debts, to purchase up real debts at a reduced value, or to screen favourite creditors; and a notorious instance of this in the case of Longtown, is generally understood to have occasioned the clause in question, the terms of which were completely descriptive of this species of security.

Such being the object and terms of the statute, it cannot be extended to any other species of security. The deed on which the claimants found is altogether different from a disposition in security. Mr. Stewart's right to the subjects on the 10th May was absolute, in this situation he continued till the 24th; and during the intermediate period, the sum of L. 1400 was advanced; at the time of granting the back bond, Mr. Stewart had it in his power to have given it under such conditions as he thought fit, for his right was absolute, and having given it under the condition that the sum of L. 4400 should be repaid, neither Sir James Cockburn nor his creditors have any right to complain. Their only right flows from the back bond; before it was granted they had none: suppose what the back bond contains had appeared in the face of the disposition, that Mr. Stewart had advanced L. 3000, and was forthwith to raise and pay L. 1400 more, could he be deprived of the pledge put into his hands, and on the faith of which he paid the money according to agreement? No surely, Sir James Cockburn would have had only a personal reversionary right, and the right of his creditors could have been no better.

The case of Riddel against Nibbles creditors Fac. Col. 16th February 1782, was referred to as a case decisive in favour of the claimants, the Court having sustained a security on the ground of its having been an absolute disposition to the property. The claimants next considered some of the arguments which had been used by the creditors.

The creditors had maintained, that an absolute disposition with a back bond was of all securities the most dangerous. To this it was answered, 1. There was in the present case no fraud. 2. Admitting that in certain possible circumstances an absolute disposition with a back bond might be made a cover for fraud; that consideration could not authorize the Court to extend the regulation of the act 1696, to a security differing totally from that species to which alone the enactment of the statute extends. The same reasoning might extend the rule of this statute to every covenant which occurs in the common intercourse of mankind, to sales under reversion, wadsets, trusts, &c; but on the contrary, in the case even of a common heritable bond, it is not necessary that the money should be paid down until the investment be taken; as was found in the case of Sir George Aber-
Crom-

cromby *, where the whole money was not paid till months after the date of the infestment; and in the circumstances of this case, even had this been a common heritable bond, since the last payment was made, the very day on which the infestment was put on record, the objection ought to be repelled. 3. It is a mistake to suppose that the security in this case could have been made a cover for fraud, Mr. Stewart appeared from the record to be absolute proprietor, or if the back bond which was likewise on record, had been consulted, Mr. Stewart's security would have appeared to extend no further than to his present claim.

The creditors founded on the decisions in the cases of Dempster v. Lady Kinloch, June 1750. Pickering v. Newenham and Everet. To which it was answered by the claimant, that the nature of the securities in all these cases was different from that of the security in the present, since in none of them was there an absolute transference of the property: And indeed it was admitted in Newenham's case, that if there had been an absolute disposition, there could have been no question. As to Dempster's case, nothing more was decided than that Lady Kinloch's infestment gave her a preference over the sums advanced by Mr. Dempster after the date of her infestment; and Lord Kilkerran observes, that the decision went altogether on the construction of the back bond. The judgment of

I

of

* Sir GEORGE ABERCROMBIE, Claimant,

AGAINST

Creditors of Sir JAMES DUNBAR, Objectors.

The claimant agreed to advance to the bankrupt upon the 20th December 1774, the sum of L. 5000, for which he was to receive an heritable security; the bond was executed, and the infestment taken upon it in November, and these deeds were then deposited in the hands of a person who was the man of business of both parties. The money, which was to have been advanced on the 20th of December, was not, however, all paid until the spring following; after it was fully paid, the heritable security was delivered to the claimant.

In a competition of Sir James Dunbar's creditors, it was objected, that as the L. 5000, had not been advanced prior to the date of the infestment, the security was void in terms of the act 1696. c. 5.

In arguing this case, it would appear from the faculty collection (from which July 30, 1789. the above state has been taken), that the only authorities founded on by the parties, were, Kinloch v. Dempster, 13th June 1750. Kaimes's Rem. Dec. Kilkerran v. per. and real, p. 293.; and the case of Pickering, v. Smith. The Court at first sustained the objection; but upon a hearing in presence it was ultimately repelled. What follows is an account (though a very imperfect one), of the grounds of that decision.

Lord Henderland.—1. There is no fraud: 2. The deeds remained deposited with the agent for the bankrupt until the whole money was paid: 3. It is proved from written evidence, that the claimant received at the beginning of the transaction, a list specifying the debts which he was to pay, and the debts in that list are

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of the Court in these cases cannot therefore affect the present question.

On these grounds, the claimants maintained, that the regulations of the act 1696 did not apply to this case; but even admitting that they did, the decision of the Lord Ordinary proceeded on grounds much too general. His Lordship had sustained the objection, because the sum of L. 1400 was advanced after the date of the infestment: On the same principle, every heritable security might be challenged. But on the contrary, the objection has often been overruled: thus in the case of Sir George Abercrombie, the Court repelled the objection on the act 1696, although the infestment was taken and recorded months before the loan was completed. In like manner, in the case of Lord Camelford, the money was not advanced till some weeks after the infestment was taken; and although in the ranking of Dalswinton, where that case occurred, every objection was started that the ingenuity of lawyers could suggest, it never occurred to them, that an objection lay on the act 1696.

In another view the claimants argued that the L. 1400, had it not been advanced by Mr. Stewart in terms of the contract, was a debt which a Court would have rendered effectual to the bankrupt,

are those which have been paid. Now, it must be admitted, that the security appears at first sight to fall under the act: But an expiscation has been allowed, and it turns out, that the creditor was to pay certain debts already existing, contained in a list given to him by the debtor in the bond, and that these debts were accordingly paid. In this situation, the security cannot fall under the statute; for as the creditor was to pay debts existing previous to that security, it cannot be considered as a security granted for debts to be afterwards contracted. Besides, the deeds were to remain undelivered until the whole money was advanced. It is very true, that *ex facie*, the bond was delivered, when it was given to a person to take the infestment. This is no doubt to be considered as the presumptive term of delivery: But here it has been proved that the deeds were actually not delivered, nor meant to be delivered, until the money was advanced. This security does not fall under the statute.

Lord Justice Clerk (Macqueen). This is an abstract question in law; it is a very important one. Prior to the delivery of the deeds to the creditor, it is acknowledged, that the whole of the money was advanced to the debtor; but it is not clear how much was paid prior to the date of the infestment. Whether then, is the date of the sasine, or that of the delivery of the deeds, to be the rule? In personal transactions people trust to each others good faith; but in heritable securities, the creditor trusts only to the effect of his bond and infestment. He retains possession of his money until he sees it secured by a complete feudal title; and this includes not merely a sasine, but a sasine duly recorded. It would be strange indeed, were the law to sustain an objection to such a security; and because the money was not advanced until the infestment was put upon record, to find that it fell under the enactment of the statute 1696. How absurd, that the law should declare the creditors security to arise from the records; and with the same breath declare the deed null, if the receiver think it prudent to insist (before advancing his money on the faith of it,) that it should enter these records. The law never meant, nor could it mean any such thing. As the law stood at the date of the act 1696, lands might have been effectually burdened by a general

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bankrupt, and therefore it could not in terms of the statute be held to be a future debt.

C A S E

II

Argument for
the Objectors.

The creditors agree in thinking, that the dangers which the claimants point out were some of those which the legislature had in view in framing the act 1696; but there appears no ground for a distinction betwixt deeds which bear *in gremio*, that they were granted for debts contracted, or to be contracted; and absolute dispositions where the same thing is declared by a back bond; or if there be any difference, the reason of the law applies more strongly to the latter case. By the act every right without distinction that shall be granted for debts to be contracted, is declared to have no force with respect to any debts contracted after the *fasine*; and in this case it appears, as well from the *missive*, as from the back bond, that the disposition in question was granted merely in security of a debt.

The object of the legislature was to guard against securities for debts not actually contracted, but which might be contracted thereafter; and for this purpose all securities for sums not advanced before the date of the *fasine* were prohibited. The legislature proceeding in this way cannot be supposed to have confined the enactment to one particular species of security, leaving an open door for the evil in another form; they wished to comprehend every possible case; accordingly the most general comprehensive words are used in the statute, “ any disposition or
I 2 “ other

ral infestment. The inconveniency and bad consequences of this had long been felt; and to such a height had the practice risen, that securities for debts to be contracted were in use. It was to redress this evil that the act 1696 were made; and that act is to be considered as a declaration of the common law, with a view to check a practice so clearly adverse to feudal principles, rather than as a new enactment. By the words of the act, the debt must be contracted at the date of the infestment, but it could not be meant to preclude the infestment from being perfectly completed before the money was advanced upon it. Now in this case the security, after the infestment was taken, remained in the hands of the debtor, and the whole money was advanced before it was allowed to become a security by delivery to the creditor. Mr. Duff, in whose hands it remained, was the confidential agent of Sir James Dunbar; and he acted upon this occasion as his depositary. We are told by the writers on our law, that when a deed is out of the hands of the granter, if it be an onerous deed, it must be presumed to be in the possession of the holder for behoof of the grantee: but wherever there is evidence of the nature of the deposition, this general presumption, must yield to that evidence, and the terms of the deposition must have effect. It has been said, that infestment is delivery; I deny it: Where the granter gives infestment *propriis manibus*, he retains possession of the warrant: Where it is given by his bailie, the bailie must return the warrant to him: A *fasine* without a warrant is of no use; and there can be no action of exhibition against the granter, by which the receiver can force delivery of the warrant, without fulfilling the conditions of it. His Lordship, in illustration of this, referred to a case, where a vote had been created upon one of the forfeited estates; but the warrant not being in the hands of the vassal, his right to vote was set aside. His Lordship was for repelling the objection.

Lord

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"other right that shall be granted, &c. for relief or security."

The enactment of the statute does, as already observed, apply with all its force to securities granted under the form of an absolute disposition with a back bond; for these may be the most dangerous engines of fraud. Securities of this kind may be sopited by payment, and again raised up to the greatest extent without the possibility of a check. In the present case the absolute disposition was granted for L. 4400 and the subjects sold for L. 17,155 Sterling and to this extent (if the claimants argument be well founded, Mr. Stewart might at any time have advanced money to Sir James Cockburn to the prejudice of the other creditors.

The claimants themselves do not deny that such a security may be a cover for fraud; but they alledge, that, that consideration could not authorise the Court to extend the regulation of the act to a security so different in its nature from that pointed out in the act; but the enactment of the statute is limited to no particular species of security; by its express words, it extends to every security granted, for debts to be contracted, in future. The words, therefore, are clear; but were there any doubt, the Court would not adopt a construction which would defeat the view of

Lord Swinton—It is not necessary, in order to found the objection in this case, that fraud should be proved; it is sufficient that the security be for a debt afterwards contracted. The date of the sasine is the rule, and the question is, Whether was the debt contracted at the date of the sasine? Now, no debt was contracted in this case until the money was advanced; nor was there any actionable obligation to pay the same. His Lordship was for sustaining the objection.

Lord Rockville—The debtor in the bond was obliged to leave the country, and it was necessary that the bond should be executed before he went away; it, therefore, was executed and deposited with Mr. Duff, who gave a letter acknowledging himself to be accountable for the deed to the debtor, and a list was furnished of the debts that were to be paid off. The lender was intitled to keep his money until he received a complete security. No doubt, there was, from the date of the infestment, a security *in forma verborum*; but there was truly no security until the deeds were delivered to the creditor: until delivery they were entirely in the power of the granter.

Lord Gardenstone—His Lordship observed, that the objection was an improper one; it was not authorised either by the words, or by the sense of the act.

Lord President (Miller)—The deeds were in no sense to be considered as affording a security to the claimant at the date of the sasine. It was only a step in the transaction; merely a preparation for it. The act says, that a security for future contractions, shall not be effectual: But this is no description of the present deed: This was one transaction; a loan of L. 5000 was the sole object in view; it was in its progress when the infestment was taken, but it was not completed until the whole money was paid up, and the security put into the possession, and delivered to the use of the lender. The statute is meant to guard against the introduction of a new debt arising from a separate transaction than that for which the security was originally granted: The statute is meant to guard expressly against the danger arising from bonds of relief. Suppose then an heritable bond to be given to a friend, in relief of a cautionry obligation—Would your Lordships cut down that security, because the cautionry obligation was not signed until the day after the infestment in relief was taken? If you would not decide so, in a case which was principally in the view of the statute,

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of the legislature; and were the claimant's construction adopted, the statute would be of no avail, for nothing more would be necessary than to change the form of the security, and, in place of declaring in the body of the disposition that it was granted in security of debts to be contracted, to declare this by a back bond; by this means that very evil would be authorised, which it was the object of the statute to prevent.

It may be said, that by the disposition the proprietor is defrauded, and his creditors have no reason to trust to that subject; and if he sees the back bond, he may satisfy himself as to the amount of the debts. But the same argument applies equally to the case of an investment bearing *in gremio*, to be for security of debts to be contracted; for there likewise the creditor is put on his guard. The object of the statute was not to prevent creditors from trusting to a subject as free, which was truly incumbered; the intention was, to destroy all previous securities for debts to be contracted thereafter, because they could easily be employed as engines of fraud; for this reason, the enactment was general; and although it may happen to strike against debts where there was no fraud, still the general regulation must have its effect in these cases, as well as in others.

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How can that statute be made to reach such a case as the present? We do not weaken the act by sustaining this bond; for wherever *saime* is taken before the money is paid by the lender, the burden of making good his security by evidence of his having paid the money must lie upon the holder of the security. Here that is proved by the circumstances of the case; and this deed cannot fall under the act.

Lord Monboddo—In this case the investment was taken before, but no warrant was delivered to the claimant until after the money was advanced. The security was not granted *um effectu*, till delivery. It is a good security, although the *saime* was taken, and the whole completed previous to the payment of the money.

Lord Dreyhorn—If the creditor had advanced part of the sum at the date of the *saime*, Would he have had a real security for that part? Or would he have been intitled to insist for delivery of the bond on giving a back bond for what was not advanced?

Lord Justice Clerk—The bond would have been qualified by a declaration on the back of it, or a new bond would have been granted.

Lord Dreyhorn—I am inclined to think the security effectual.

Lord Esqgrove—His Lordship said, he had no difficulty in this case. It was a fair and honourable transaction. The whole sum was agreed to be lent to answer the pressing occasions of the borrower. It was not to be advanced all at the same moment; L. 1000 was to be instantly given, and the remaining part of the sum applied, according to the direction of the debtor, in payment of debts already existing; and as the money has accordingly been advanced, a question like this is rather surprising. It would be a disgrace to the country, were there a law existing amongst us which would have the effect of cutting down such a claim. His Lordship read the words of the act. This act is directed against bonds of relief as covers to fraud; against debts which were not in contemplation at the time of granting the security; against relief of debts to be afterwards contracted; and against indefinite securities which might be made a cover for future debts. The act does not declare such deeds to be void; it allows them to be effectual for

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The claimants refer to the case of Riddle v. Niblie's creditors; but, on looking into the printed papers, it appears that a variety of different points occurred; and there is only two paragraphs bestowed on the act 1696 on one side, while it is hardly mentioned on the other; it could not therefore be a decision on a full discussion. It was further said, that this statutory enactment has always had the fullest effect given to it; and the following cases were cited in evidence of this: Kinloch against Dempster, 13th June 1750, collected by Kilkerran, Falconer, and Lord Kaim, R. D. In that case a security had been granted for a certain sum, part of which had been paid; and for the balance, a back-bond was given by the person receiving the security, obliging himself to pay the balance on forty days previous notice: it was afterwards accordingly paid; yet the security was deemed ineffectual for this balance paid after the date of the infestment; and the ground was, that the back-bond did not constitute a debt, but only founded an action to create a debt, and that the actual payment of the balance was the creation of the debt. It was thought, that had it been an absolute obligation, this infestment would have been good as being granted for a prior debt. Now, the missive letter in this case made no absolute obligation; and however favourable cash accounts may be, although there can be in such cases little danger of fraud, although they be limited to a specific sum, yet even in these cases the statute has been rigidly observed. January 16, 1788, Pickering against Smith, Wright, and Gray. Newenham, Everet and Company, against Creditors of Stein, 1789.

There are two arguments urged for the claimants; 1. That the disposition was granted in security of the L. 3000 advanced

for such part of the debt, as though not appearing *ex facie*, was yet truly due at the date of the infestment. This, perhaps, was giving too great a latitude: but, in the present case, the bond describes debts that were existing and in contemplation at the time. From certain circumstances it was impossible to receive the whole of the money immediately, but it was all to be paid within a short time; it was fixed, liquidated, and agreed upon, at the date of the bond. The act refers to sales which were to be instantly effectual to the creditor: but here the creditor derived no right from the infestment, it was not effectual to him, he had no warrant in his custody, and he could not have forced delivery of the bond. In the case put by Lord Dreghorn, it may be said, that the bond is not yet delivered; that the depository cannot give it up: but if the debtor has received part of the money, the depository to that extent holds the security for behoof of the creditor; and for the sum advanced, the creditor would rank in virtue of the infestment. If the act 1696 is to be judaically explained, in the manner which the objectors insist for, it is the same thing with saying, that there shall be an end to heritable securities in Scotland. I am not obliged to put faith in any man, and to deliver him my money before I receive my security. I trust for that to the law alone. His Lordship was for repelling the objection.

It was upon this reasoning that the judgement in this case proceeded; and it is a judgement which has been approved of by the Court in several late cases where their Lordships had occasion to take notice of it.

LESTER, and Company,
Claimants,

in the sequestrated estate of
Kilbagie, Objectors.

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the Dec. 22. 1789.

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Lord Justice Clerk, after assenting to the above opinion, observed, that it is very common for a person whose affairs are in disorder to grant an absolute disposition to a friend for the purpose of extricating them; that it is part of such a transaction for the disponent to give a back bond, obliging himself to denude on reimbursement of such sum, as may be advanced; that on such a disposition it was common for the grantee to borrow money and pay off the debts, and that to this mode of transaction, no objection lies. It does not fall under the meaning of the act 1696; and the disponent may with safety advance money to the value of the estate. His Lordship also observed, that there was another ground on which this security may be supported: In the case of Sir George Abercrombie, the Court sustained a conveyance in security, which had been deposited until the money should be advanced, and found that all the payments, before delivery, though after the date of the *fausne* were good: on this substantial ground, that the lender is not in safety to advance money until the *infestment* be taken, and the bond with the recorded *infestment* produced to him. Now the money was given in this case on the day that the *infestment* was put on record.

Lord President. His Lordship said that he was clearly for repelling the objection on both grounds.

Judgement.

The Court, in advising the petition and answers, altered the Lord Ordinary's judgement reclaimed against; and repelled the objection to the interest produced for Messrs. Drummonds.

For Claimants, A. Abercromby,	} Advocates,	Ja. Beveridge,	} Agents.
Objectors, Matt. Ross,		G. Johnston, C. S.	
Lord Dunfinnan Ordinary.		Menzies Clerk,	
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IV. Sir

IV. Sir WILLIAM FORBES, JAMES HUNTER, and Company,
Bankers in Edinburgh, Claimants,

AGAINST

DAVID STUART, Esq; Trustee on the sequestrated estate of
James Stein, late Distiller at Kilbagie, Objectors.

Indorsements by a bankrupt, within sixty days of his bankruptcy in favour of a banking company, with whom he had a cash credit, and who within the same period advanced money for him to a greater amount, are not struck at by the act 1696.

James Stein had a cash account with Sir William Forbes and Company; and the transactions under it were regularly carried on, to the day of Stein's failure. Stein failed on the 28th February 1788, at which time the balance due on his cash account amounted to 34,636 l. 11 s. 10 d. Sterling. In security of this balance, Sir William Forbes and Company, held bills that had been deposited by Stein; part of these bills (to the value of 18,458 l.), had been deposited within sixty days of the bankruptcy; but Sir William Forbes and Company on the other hand, had within the same period, advanced for Stein 38,509 l. 6d. Sterling.

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When Sir William Forbes and Company entered their claim under the sequestration, the trustee objected to it on this ground, that the right to the bills which had been deposited with the claimants, within sixty days of the bankruptcy, in security of a debt previously existing; was struck at by the act 1696 c. 5. This objection was followed by answers and replies, and the Lord Ordinary having heard counsel on the point his Lordship made avisandum to the court, and appointed the parties to give in informations. Dec. 22. 1789.

The act 1696 c. 5. is a salutary law, and has uniformly received a liberal interpretation; the enactment is expressed in general and comprehensive terms, and the indorsement of a bill in favour of a creditor, is as much within the reach of the statute as the granting of an heritable bond; were it otherways, this beneficial statute might be completely evaded. Had the bills in question remained with the bankrupt, they would have made part of his funds, and have been divisible among the creditors at large; the indorsement therefore in favour of the claimants is an act of the bankrupts giving a security in preference to the other creditors; and directly in the face of the statute,

Argument for
the Objectors.

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statute. There can be no difference betwixt the assignation of a bond, and the indorsation of a bill, to say that the latter is a transaction in the common course of business to which the statute cannot apply, is a distinction without a difference; if it apply to the one, it must likewise apply to the other; the indorsations in the present case were not in payment, they were merely in security; and on the failure of the acceptor, the bills would have been put to the debit of the bankrupt. The bankrupt thus gives a security to one creditor, in preference to the rest: there can be no distinction betwixt the indorsation which gives that security, and the common case of a voluntary disposition or assignation.

It has been stated for the claimants, not only that the depositing of the bills, was a transaction in the usual course of trade; but that here there can be no imputation of fraud: nor was there any intention of evading the act 1696. In answer to this the objectors admit, that there was no idea of actual fraud; but let the parties have been ever so fair and honourable in their proceedings, the Court must presume from the date of the deed, that it was executed in fraud of the act. This is exemplified in the question that occurred with Messrs. Drummonds, in the ranking of the creditors of Seton of Touch.

The decision in the ranking of the creditors of Graitney, February 1728, has been referred to by the claimants. There a service expedite within sixty days of bankruptcy, for the purpose of validating an investment of annuient, taken prior to the sixty days, was found not to be struck at by the act 1696: But that question had not the smallest connection with the present, the preferable security was there executed, and the obligation on the bankrupt complete, long prior to the sixty days; had the investment been taken within the sixty days it would have been similar to the present case, but then it would have been reducible: Had the bankrupt here, deposited the bills with the claimants, previous to the sixty days; or had he, previous to that time, bound himself to assign a bond, and had omitted to indorse the bills, or to execute the assignation, till within the sixty days, then the case of Graitney might have been founded on, but in the circumstances that have here occurred, it cannot apply.

It was further argued, that as bills of exchange are by special statute exempted from any exception, not appearing *ex facie*; and as payments in cash are not struck at by the act 1696, the objection cannot in the present case apply to the indorsations of the bills in question. Had these bills been received in payment, the objector would have admitted that the payment could not have been set aside, but the case of payment does not apply. As to the privilege of bills, it will not follow, that

that because bills possess certain privileges, they therefore possess that of being exempted from the operation of a statute, which strikes equally against every act and deed of a bankrupt; and the objector's plea is, that under that statute the indorsations are legal nonentities. Further, according to the claimant's argument, bills before they were privileged by statute, would have fallen under the act 1696, had it then existed; and it would have required a clear and strong exception to have saved them from the operation of so general a law. Now the act which gave privileges to foreign bills of exchange was passed in 1691; and it could not be the intention of the legislature to exempt them from a statute that was not in existence; neither can it be presumed that the statute 1696 meant to exempt foreign bills of exchange, when we see no exception in that statute, to the general words of the enactment; besides, had such been the intention of parliament, it would have appeared in the act which extended the privileges of foreign to inland bills, and which was passed within a fortnight after the statute 1696.

The claimants have also endeavoured to support this plea, on the circumstances of the case: They have said, that the bills indorsed to them within the sixty days, were on account of advances to a much greater extent made within that period. Had this been the fact, the objectors must have admitted it, to be unanswerable; but it is not so. Supposing the claimants not to have been creditors of the bankrupt on the 29th of December, the 60th day preceding the bankruptcy, and that the bills put into their hands by the bankrupt had been applied in advances for him, their plea would have been unanswerable; but although it be true, that there were advances made within the sixty days, yet the bills lodged within that time, were lodged not as a fund of future credit, but in security of the debt previously contracted, and which never was diminished. Thus, although L. 38,000 was advanced within the sixty days, yet it was not after the lodging of the bills for L. 18,000; on the contrary, it appears that the first bill was lodged on the 7th January, at which time there was due the claimants upwards of L. 17,000; and this sum never was diminished. This being the case, the indorsations objected to, must be considered as having been granted in security of a prior debt; and if so, they were from the moment of deposition void and null, and thus incapable of reviving, so as to become securities for future advances, even had the prior debt been extinguished. To illustrate this, suppose the bankrupt to have failed immediately after the bills were lodged, without any advance having been made; the transmission must have been void in terms of the statute; if so, it does not appear how future advances by the

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claimant, can purge the statutory vitiosity of the conveyance.

Argument for
the Claimants.

The claimants apprehend it to be clear, that indorsations, in the fair course of trade, are not deeds which are struck at by the act 1696, where a single indorsation has been given by a bankrupt, for the purpose of preferring one creditor to another, such indorsation has been reduced; but in cases where this has happened, there has been a proof of actual fraud; here there has been no fraud: the transactions form a continued chain of fair and onerous dealings down to the hour of bankruptcy.

Onerous indorsations of bills are unchallengeable: In this case value was given; and it is of no consequence whether the value was paid at the instant of deposite, or the day after; it was given upon the faith of the bills already lodged: it is therefore impossible to discover upon what medium such transactions can be affected by the act 1696.

To show the nature of the objector's plea, let us suppose that a banking house in this city has been in use for years to remit bills to their correspondent in London, to the weekly amount of L. 10,000, or to the amount of L. 80,000 in sixty days, while the London correspondent remits to the house here to an equal extent, that this continues down to the day of the bankruptcy of that house, does the act 1696 declare those indorsations null, which have been made by the bankrupt within sixty days of his bankruptcy, at the same time that the bankrupt is allowed to retain the remittances of his English correspondent? This could not have been enacted, without the grossest injustice to individuals, and the greatest prejudice to commerce. It is the object of the statute, to repress undue preferences in favour of prior creditors; but it could never be meant that those transactions should be void, in which the original debt, and the indorsations in payment thereof, are so closely connected.

The transactions betwixt the claimants and Steen, were exactly of this nature. They were very different from that case where an heritable security is granted to the holder of a bill, or where a bill is indorsed in security of a bonded creditor: They were transactions which the statute could not have in view, and which is not reached either by the words or spirit of it.

It was stated for the objector, that the statute does not suppose intentional fraud, either in the giver or receiver of the deed; that the date of the deed being within sixty days, is a sufficient ground of challenge; and that indorsations to bills cannot be distinguished from a voluntary disposition or assignation. But the difference is obvious, in dispositions and assignations a proof of fraud may not be required, because the deed is grant-

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ed without value; but bills indorsed in commerce, is a case widely different. It is clear, both from the import and terms of the act, and from a uniform train of decisions, that rights granted, not in security of previous debts, but for a price paid, are not challengeable on the statute. It is voluntary deeds only which give a preference, to former creditors that are struck at by the statute.

Accordingly it has been repeatedly found by the Court, and is now fixed, that the act does not extend to deeds granted for immediate value, 1st January 1717, *Brough v. Gray*. In the cases founded upon by the objector with regard to the indorsations of bills, the judgment of the Court establishes this point, that an indorsation for value, and not in security of a prior debt, is unchallengeable. *Fountainhall, Balfour v. Durward. Pr. Dalrymple, Campbell v. Graham of Gorthie.*

The objector seems to admit this doctrine; but he says that the securities were lodged, not as a fund of credit for future advances, but in extinction of a previous debt. This view of the matter is disproved by the account; whence it appears, that although 18,458 l. 2 s. 4 d. was deposited with the claimants within the sixty days, yet they made advances during that period to a much greater amount.

It was observed by the objector, that the debt due to the claimants on the 7th January 1788, was never decreased previous to the sequestration; and it was thence inferred, that the indorsations were in security of the prior debt; but the very reverse ought to be the conclusion, for as the debt was increased by progressive advances, it is evident that the bills which were then indorsed to the claimant were not for prior but for instant advances.

According to every view of the matter, therefore, the indorsations in question are not reducible upon the act 1696.

Lord *Eskgrove*—His Lordship observed, that in the common case the indorsation to a bill of exchange is struck at by the act 1696: But his is a case of a very different nature. It never was the object of that act to affect the commercial dealings of a great mercantile house. Indeed, were it to have this effect, no person would engage in the business of a merchant. His Lordship stated the case of a country gentleman's indorsing a bill in payment of a debt within sixty days of bankruptcy, as an instance where an indorsation to a bill would be struck at by the act of parliament; and remarked the difference betwixt that case and the present. His Lordship did not rest the cause on this single ground, for he thought it equally clear, from the terms of the agreement entered into betwixt Sir William Forbes and Company and Stein. The agreement was, that Stein should deposit money with that Company, which

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which they were to apply in purchasing such bills of Stein's as appeared in the market. Sixty days previous to the bankruptcy Stein was due them a certain sum of money in consequence of these purchases, while, on the other hand, Sir William Forbes and Company was possessed of bills deposited by Stein to a greater amount—the one must be applied in payment of the other. During the sixty days previous to the bankruptcy, Sir William Forbes and Company received indorsements to the value of L. 18000, (which could not be in security of the prior debt, for that was fully secured already); and within the same period the Company paid out for Stein L. 24000 so that in fact Stein received much more than the full value of his L. 18000. The L. 18000 must therefore be presumed to have been applied in making this large advance; and as the act does not refer to onerous payments, nor to securities for them, the present case cannot fall under it.

Lord Swinton—The sum received within the sixty days was applied in the advance of a much larger sum; therefore this case is not affected by the statute.

Lord Rockville—Concurred in this opinion.

Lord Dregghorn—An indorsement to a bill in security, as in the case of Angus, is struck at by the act; but that is not the case before us. Had Sir William Forbes and Company made no farther advances for the Steins after the sixty days, there might have been a question how far the Company would not have been obliged to have repaid the sum deposited with them during that period. But this was not the case, the Company gave full value for the bills, which were deposited with them within the sixty days. The case of Newham and Everet does not apply: His Lordship expressed great doubts how far the judgement in that case was well founded.

Lord President—The indorsement of a bill falls under the statute as much as any security whatever. Had the bills in this case been indorsed merely in security of a prior debt, there cannot be the smallest doubt that they would have been struck at by the act. But take the case as it stands: On the 13th December 1787, a balance of L. 13000 appears in favour of Sir William Forbes and Company. On the other hand, Sir William Forbes and Company had bills to the amount of L. 28000 or L. 30000 lodged with them, both as a security for the balance due to them, and also as a fund of credit on which Stein might operate. Stein accordingly did draw on this fund within sixty days of his bankruptcy, and increased his debt to L. 39000; he also made a deposit of L. 18,000; the present challenge is only directed against this deposit. Had Sir William Forbes and Company stopped short, and made no advances to Stein within the sixty days, perhaps

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the payments to Sir William Forbes and Company during that period might have been reducible; but great sums were drawn out, Sir William Forbes and Company received no advantage from the consignment within the sixty days, for the debt was increased in proportion to the pledges: so far from receiving any advantage, Sir William Forbes and Company would be gainers were they restored to the situation in which they stood at the commencement of the sixty days. His Lordship declined to enter into the consideration of the disadvantages which might arise from applying the statute 1696 to the case of commercial transactions betwixt great mercantile companies.

Lord Justice Clerk was clear on the *species facti*, that the payments made to Sir William Forbes and Company within the sixty days are not challengeable. Bills to the amount of L. 18000 were indorsed within this time, and Sir William Forbes and Company, on the other hand, advanced L. 24000. Had Stein discounted these bills, and got cash for them, no doubt could have been entertained of the propriety of the transaction; what has happened here is equivalent: and on this clear ground the act 1696 cannot apply to this case. His Lordship agreed in the opinion, that an indorsation to a bill in payment of a debt was a deed which would be struck at by the statute.

When the vote was put, Lord Justice Clerk stated it as a question of great doubt, and of very general importance, whether the transactions of two mercantile houses, carried on without any suspicion of fraud, down to the bankruptcy of one of them, would fall under this act of parliament.

The Lord President observed that there was no occasion for giving an opinion on that point in the present question; that the Court would decide upon it when it came before them.

It seemed to be the general opinion of the Court that it was a question of very great nicety, and which would be entitled to particular attention whenever it should occur.

The Court found that the act 1696 does not apply to the present case; and repelled the objections to the claim of Sir William Forbes and Company.

For Claimants Honyman,	} Advocates,	J. Taylor C. S.	} Agents.
Objectors R. Dundas,		R. Boswell C. S.	

Lord Justice Clerk Ordinary. Home Clerk.

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V. Petition of Sequestration, DAVID DALE, Merchant in Glasgow, and Others, Petitioners.

AGAINST

JOHN YOOL, Manufacturer at Anderston, Respondent.

Open accounts are so far understood to be grounds of debt, in the sense of the act of the 23d of George III. that, joined to a proof of the bankruptcy, they are held to be a sufficient ground on which to award a sequestration.

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The petitioners were creditors of Yool's to the extent of 201l. 6 s. 6 d.; but their claims rested solely on open accounts, excepting a bill of 55 l. 12 s. held by one of the petitioners. On these grounds of debt, and on a recital of the 6th section of the act, the petitioners pray for sequestration of Yool's estate. This application was opposed by Yool, on the following grounds.

Argument for
the Respondent.

It has hitherto been understood, that a person, insisting for this last act of the law against a merchant, must show, that he is a creditor: for this purpose, the statute expressly requires the production of the grounds of debt. This rule is so strictly adhered to, that even when the debtor concurs, the Court are in use to require production of a formal ground of debt. The same caution is equally necessary where the debtor does not concur, for it is of importance that every merchant be protected against the wanton application of so serious a step of diligence.

The open accounts produced by the petitioners are not grounds of debt, for grounds of debt, in the universally received meaning of these words, are written documents: open unvouched accounts can, therefore, be no ground of an application of this nature.

Some of the debts are not owing to the extent claimed, neither is the term of payment arrived; it would, therefore, be a violent stretch of the sequestration act, if a creditor, who is not intitled to use the ordinary means of legal diligence for recovering his debt, should, notwithstanding, be intitled to apply for this extraordinary remedy, and to put an end to a man's business.

This is a question worthy of serious consideration; for if an application of this kind be competent on such grounds, it will lead to very dangerous consequences. Many a man, in good credit and of sufficient property, may be unable to satisfy a captious or suspicious creditor, or attempts may thus be made

made to wrest from a merchant payment of unjust claims. It is for such reasons, that the law requires a written acknowledgement of debt, or the decree of a Court to precede so dangerous a step of diligence as that of sequestration.

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The *Lord President* stated the question to be, Whether open accounts, in the meaning of the act, be sufficient grounds of debt on which to apply for a sequestration? His Lordship further observed, that the insolvency in this case was proved by the trust deed which had been executed by the debtor, and by which he had divested himself of every thing. His Lordship was, therefore, of opinion, that if the vouchers produced by the petitioners can, in any shape, be sustained as grounds of the application, the sequestration ought to be awarded.

Lord Swinton observed, that this was not a new case; for open accounts had been sustained as sufficient grounds of an application of this nature.

Lord Hailes was against sustaining them.

Lord President.—His Lordship allowed, that there was an ambiguity in the act which ought to be cleared up: but where there is a doubt, his Lordship thought that the bankruptcy being proved, sequestration ought to be awarded, as it has the effect of preventing preferences amongst the creditors.

Lord Eskgrove mentioned a case to prove the necessity of producing a ground of debt. His Lordship then said, the law requires the oath of the creditor as well as the voucher of the debt, although that voucher should be a bond or a bill; and the reason is obvious: although a voucher be produced the debt may have been paid, the oath guards against this. Thus we see that the law requires a proof of the existence of the debt before a sequestration be awarded.

Lord Justice Clerk—I am rather of an opinion favourable for the claimant. It is not necessary that the creditor produce an unexceptionable ground of debt; the essential requisite is the proof of the person's bankruptcy: therefore, wherever that appears, it is a matter of little moment who applies for a sequestration. The only consideration is, that the debt be not a trifling one, as that might be attended with bad consequences. The oath which is required, is not meant to establish the debt; the debt may, notwithstanding the oath, be afterwards cut down in the competition. The oath creates merely a presumption of debt, and is a means by which to ascertain the extent of the debt required by law, there is no necessity for establishing the debt by a kind of *res judicata*; the oath gives a presumption sufficient to ground the application.

Lord Eskgrove—By the former act, the party himself might have applied; the bad consequences of this were perceived,
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and were remedied in the present act, by requiring the concurrence of actual creditors. Now if an oath be sufficient evidence of a debt, How are we to distinguish betwixt this and the case of an application upon an open account? It is an evasion of the law. The purpose of the oath is, not to prove the existence of the debt, that must be proved by the voucher, the oath proves only that the debt has not been paid. In this case there is an oath, but no ground of debt; and were we to sustain it as a sufficient ground for an application of this kind, there would then be no distinction betwixt the case where the real creditors of the bankrupt apply, and that where the application is made by persons who have no claims: and yet applications of the latter sort may be improper.

Lord *Monboddo* was of the same opinion.

Lord *Henderland* read a clause of the act, to prove, that the expression of ground of debt, was by the legislature, held to apply to an open account.

Lord *Eskrove* said, that had the debtor admitted the contraction of the debts in question, his difficulty would have been removed; but the debtor says expressly, they are not due.

Lord *Rockville*, in the circumstances of the case, and considering the proof of the bankruptcy to be the principal ground for awarding the sequestration, was of opinion, that the prayer of the petition should be granted.

State of the vote, Sequestrate or Not.

Sequestrate, Justice Clerk, Swinton, Rockville, Stonefield, Henderland, and Dunfinnan.

Not, Eskgrove, Monboddo, Hailes, and Ankerville.

Jan. 26. 1792.

The Court awarded the sequestration.

For Petitioners, David Cathcart,	} Advocates.	Alex. Young, C. S.	} Agents.
Respondent, William Tait,		John Dillon,	

Inner House.

Home Clerk.

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VI. WALTER,

VI. WALTER EWING M'LEA, Merchant in Glasgow;
Petitioner;

AGAINST

JAMES M'LEHOSE, Merchant in Glasgow, Respondent.

Under the clauses of the bankrupt statute, by which the examination of the bankrupt, his family, and others acquainted with his business, is authorised, the trustee has no power to call upon the creditors of the bankrupt for examination.

David Robb and Company stopped payment in January 1792; William Robb, one of the partners, absconded; and the petitioner, being appointed trustee under the sequestration, wished to examine M'Lehose, who was uncle to William Robb, and who now appeared as an heritable creditor of the bankrupts, under circumstances which the petitioner conceived to be suspicious. The respondent accordingly did appear before the sheriff at the desire of the petitioner, and gave in answers to certain interrogatories previously delivered to him in writing; but the petitioner having insisted for more special answers, and also that the respondent should undergo an examination without previously knowing what questions were to be put to him, he refused to undergo this examination.

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The matter was then brought, by petition, before the Court, and a warrant was craved for examining the respondent on the interrogatories formerly put, or upon such of them as the Court should judge proper.

The petitioner founded on the 15th and 16th sections of the bankrupt statute, as an authority for examining every one who was able to give information concerning the affairs of the bankrupt, and argued thus: Argument for
the Petitioner.

The object of the examination proposed in this case, is to obtain, from the uncle of the bankrupt, who was a conjunct and confident person, a full discovery of the circumstances of certain transactions that had taken place betwixt him and William, who had absconded; and these transactions are necessary for understanding the real situation of the bankrupts affairs. The object of this examination is precisely what the statute authorises; and the interrogatories were adapted to the same end.

The respondent's objection to the examination, is founded on his being a creditor: but he has truly a double character;

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he is a pretended creditor, and he has been engaged in the traffic of accommodation bills with the bankrupt.

The last circumstance must be conclusive in this particular case, were there any doubt on the general point; but there is none, every person called upon is obliged to declare what he knows with regard to the bankrupt's affairs.

The great and important object of such examinations is to discover collusive claims; and if those who had best access to know them could not be examined, merely because they pretended to have an interest in them, the public examinations would, by no means, answer the purpose they were intended to serve.

The circumstance of a conjunct and confident person having obtained a conveyance of any part of the bankrupt's estate, in place of giving an exemption, renders him a most fit object of examination. He can best give the necessary information; he can have no good reason for refusing to answer when he is desired to tell only the truth: the respondent has refused to answer interrogatories, because he is conscious that the truth would be unfavourable for his claims.

The trustee is authorised by the statute to put such questions as may render the discovery of the bankrupt's affairs, and the surrender of his property more complete; and this was the direct tendency of the questions which were put to the respondent.

It is plain, that the examination of the bankrupt, of his family, and of others, are all of the same nature; but it cannot be doubted, that the bankrupt himself may be examined with regard to the transactions he may have entered into; this is certain, as well from the different clauses of the act, as from the oath he is required to take; and the examination of the other persons mentioned, must be similar.

Accordingly, in the Sheriff Court of Glasgow, where there are more examinations than in all the rest of the kingdom, it is the constant practice to examine all who have had transactions with the bankrupt, where there is any thing suspicious, or any thing that requires investigation; and there is no instance where the mere circumstance of the person's being a creditor, or concerned in the transaction, has been thought an objection to his examination.

In the sequestration of James Mitchell and Company's estates, one John Holmes, a brother-in-law of the bankrupt, objected to his being examined; on this ground, that he understood an action of reduction was to be brought of certain transactions into which he had entered with the bankrupt; but, by an order of the Lord Ordinary in the time of vacation, he was appointed to undergo an examination.

Sept. 16. 1786.

The power of examining the creditors of a bankrupt was unknown previous to the act 1783. By that act, no such power was given to the trustee: it is a power that may be attended with dangerous consequences, and may be employed for very improper purposes.

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Argument for
the Respondent.

Independant of statute, it is clear, that where there is no depending action, nor any question at issue in a court of justice, it is impossible to call the whole or any of the creditors of a bankrupt into the presence of an inferior judge, and examine them on the nature of their claims, or their transactions with the bankrupt, or force production of their books under pain of imprisonment: it is impossible to say that such powers existed by the law of Scotland prior to 1783. The bankrupt act 1772, gave a power of examining the bankrupt; but as to a general inquisition concerning a debt, it was utterly unknown. Even in a depending action, a judicial examination would have been competent, only where the circumstances required it.

Was this regulation then, introduced into our law by the act 1783? That statute, in imitation of the law of England, provided for the examination of the bankrupt in presence of the creditors; it authorised likewise the examination of his family, of his clerks, of his servants, and persons of that description: but there it stopped. Had it been intended to give the power of examining a creditor, the act would have expressly declared so: but, on the contrary, the examination is directed to go on in presence of the creditors.

The petitioner has mentioned, that under the words, "others acquainted with his business," the legislature meant to authorise the examination of the creditors. The answer to this is, the law stood otherways before the act was passed, an express enactment must, therefore, be shown, altering the established law. It is not enough for the petitioner to say, that possibly the legislature meant creditors to be examined, because, in one sense, every creditor is to a certain extent acquainted with his debtor's business; or, that the examination of a creditor may affect the extent of the funds, or amount of the debts. This is neither the enactment nor intention of the statute: the meaning of the act is obvious, the persons whose estates can be sequestrated are traders; and the persons to be examined with a view to prevent secretion of effects, are the family, clerks, and servants of the bankrupt: but it never was meant that the creditors should be examined at the diets of examination; on the contrary, they have nine months for making up and lodging their claims.

The examination is ordered to be in presence of the whole creditors that chuse to attend: they have a right to interrogate;

gate; they are not the persons that are to undergo the examination.

The argument drawn from the nature of the oath to be taken by the bankrupt, is erroneous; it is to be taken by the bankrupt alone, and has no reference to his servants, or such other persons as are to be examined, much less has it reference to the creditors.

The § 31st and 32d contain the regulations relative to the creditors: they must, within nine months, produce their claims, their vouchers, and an oath of verity, and then a certain time is given for preparing schemes. If a debt be objected to, the question comes directly into Court; and if it shall then appear to the judges, that an examination of the debtor is necessary, it will be ordered. But this will not be granted without cause shown; it will not be ordered to gratify the caprice, or to answer the unjust views of an individual. The same considerations will influence the Court in granting a judicial examination in a sequestration, as in other depending actions.

Judicial examination, in a depending action, is recognised by the law of this country, and may be proper: but such loose general investigations taken with a view to search out the ground of a law-suit, are not recognised; nor can they be permitted, when it is recollected where and by whom they are taken.

A factor on a bankrupt estate is commonly a creditor himself, and affected by partialities or prejudices. The business under him is managed by a person who practices before an inferior court who has likewise his prejudices and partialities, and perhaps is carried on by an intemperate zeal. Were such persons permitted to call any creditor into the presence of the sheriff-substitute, and there to precognosce him in general respecting all his transactions with the bankrupt, and to oblige him to answer interrogatories concerning sums of money descending to pounds, shillings, and pence; the dates of bills granted years ago; when payable; when discounted; by whom drawn, indorsed, and accepted; and what had become of the money received on them; the object would frequently be, not so much to get the truth, as to injure the creditor; to reduce him to the awkward situation of saying, that he did not remember what had passed, or to lead him into mistakes as to dates and sums. On these mistakes, arguments would afterwards be founded. If the mistakes were against the creditor, he would be held to them; if for him, he would be said to have concealed or misrepresented the truth.

Besides all this, Before whom is the creditor to be dragged? Not before the Court of Session, where an improper examination would be checked; but before the different sheriff-substitutes

ment in Scotland: they are respectable in their stations, no doubt, but they are not the men to whom the legislature would have committed such powers.

Neither by the common law then, nor by this statute, has the factor on a sequestrated estate a power of examining the creditors of the bankrupt.

The examination authorised in the case of Holmes, is a solitary instance, which passed without opposition; besides, Holmes really fell under the act, for he had been an agent for the bankrupt company.

When this petition was first moved, the Court were unanimous that the prayer of it ought to be granted: but the Lord President, having observed that it had not been intimated, thought that in point of form it was necessary to have an answer. Answers were accordingly appointed to be given in; and, on advising the cause, the Court were much divided on the point.

It was said, that the judicial examination of a party, even in a depending action, is not competent in the general case: it is a remedy in the hand of the judge, to be applied in particular circumstances only. Where it is used, the person to be examined does not come to answer the vague questions of the other party; the interrogatories are concerted, and he comes prepared to explain fully the points, which, in the opinion of the Court, it is his duty to explain. But were such a practice to prevail, as this which the petitioner contends for; were it in the power of a trustee, without a depending action, without any intimation of the nature of the questions, to call a creditor from the street into the presence of a judge, there to undergo the precognition; it would lay every creditor at the mercy of the trustee: his answers (when without the possibility of preparing himself) might be afterwards brought against him, and he might thus be subjected to a very intolerable grievance; nor is the judge before whom this precognition is to be taken, nor the form of procedure in such cases, capable of affording relief to the person under examination. In short, as judicial examinations are not admitted, unless where there is a depending action, and only then in circumstances which appear sufficient to authorise it; the examination of the respondent, in the circumstances of this case, is contrary to the common law, and totally unauthorised by the statute. The legislature has confined the precognition, which it has directed to be taken, to the family of the bankrupt, and to those acquainted with his business; it ought not, therefore, to be extended to a different set of people.

To other of the judges the examination of a creditor did not seem

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seem capable of producing any harm; if the person was a fair and honest creditor, then he could suffer nothing from any questions that could be put to him; if he was not a fair creditor, it might no doubt lead to his detection; but that could not be said to be improper: And it was mentioned by several of their Lordships, that from the examination of parties in the course of a cause, they had been able to bring out facts which would not otherways have been discovered. The bankrupt act was similar in this respect to the vesting act in the 1745. It was said, that in the case of an attainder, it was natural to suppose that the friends and relations of the forfeited person would conspire to secret his fortune. The legislature was jealous of such a combination, and, therefore, put it in the power of their Lordships to examine any person they might think proper, on the affairs of the forfeited person.—Such an examination was not of the nature of an examination on reference, nor an oath of verity, it was merely *ad reminendam veritatem*; and there were even instances where debts, that had been established on such examinations, were afterwards cut down by a legal proof of their collusion. This suspicion, which arises from the situation of a forfeited person, holds equally against a bankrupt; and the clause in the bankrupt statute ought to be explained in such a way as to give the same remedy and means of detection.

This last opinion was supported by the Lord Justice Clerk and Lord Monboddo; the former by the Lord President and Lord Eskgrove, &c. The Court were equally divided in opinion; and the petition was refused by the Lord President's vote.

For Petitioner, Matt. Ross,	} Adv.	Ja. Sommers,	} Agents.
Respondent, Arch. Campbell,		Jo. M'Nab, C. S.	
Inner House.		Home Clerk.	
VOL. IX. No. 4.			

BANKRUPT.

SUPPLEMENT to the preceding Case, page 80.

The judgement pronounced in this case was brought under review of the court by a reclaiming petition on the part of M^cLeay. which having been appointed to be answered, the following opinions were delivered on advising the cause.

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December 4, 1792. Judges present.

Lord President,

Lord Justice Clerk,
Lord Alva,
Lord Eskgrove,
Lord Swinton,
Lord Dreghorn,

Lord Monboddó,
Lord Stonefield,
Lord Henderland,
Lord Dunfinnin,
Lord Abercrombie.

Lord *Eskgrove* wished to know precisely what the English bankrupt statute ordered on this point.

Mr. Tait read a letter from English counsel, stating, that in England an examination might proceed under the bankrupt statute, whether the person to be examined was or was not a creditor, and that questions might be put to him relating to the general affairs of the bankrupt, or to the transactions betwixt the bankrupt and himself.

Lord *President*—His Lordship went through the English bankrupt act. His Lordship observed, that the commissioners of bankrupt were in a different situation from the sheriff-substitutes in this country. They were gentlemen of the law, and judges in the first instance. When creditors come before them, they go into all the modes of proof which your Lordships would adopt while sitting in the outer-house, and whatever a judge can do, they are authorised to do under the superintendence of the Court of Chancery. We have in some degree borrowed these examinations from the English law; but we cannot consider our examiners as acting in a judicial capacity; it is under authority of the bankrupt act alone that they act; it is there that I desiderate, and as this act is about to expire, and will be immediately laid before parliament. I wish much to have your opinions upon the subject.

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Lord Swinton—This is a most important question. I was against the opinion expressed in the judgement under review and the more I consider the matter, the more am I of that opinion. The question is, Whether Mr. M'Lehoie may be examined on a debt due to himself, and I think he may, on two grounds. It is the purpose of this act to enable the creditors to make discoveries as to the situation of the bankrupt's effects and as to the extent of his debts: now, it is a very common device to hold out fictitious debts as due to near relations of the bankrupt; and every claim of this nature ought to be investigated to the bottom. The commissioners of bankrupt in England have that power. It is said that here the sheriff is not competent; if that be the case, then he should have no power to act at all. In another view, I see no reason why creditors should be allowed to refuse answering questions which, on their coming before this Court, they will be obliged to answer.

Lord Dregburn—The object of the examination under the act, is to render the discovery more complete; and if the examination of this creditor can lead to the discovery of a fictitious debt, it is fulfilling the very purpose of the act.

Lord Henderland—I do not think that a creditor is obliged to answer questions before the sheriff. The creditors are not bound by the act to produce their interest for nine months. If, then, the creditor's grounds of debt are not founded on, can you force a creditor to come forward at that time, and before the sheriff; when by the act he is ordered to enter it in this Court, and at a future period. The object of the act is the examination of the bankrupt and his family, and is to ascertain the extent of the effects, but not to fix the amount of the debts, that is done before this Court.

Lord Justice Clerk—On considering this question, I am for supporting the interlocutor; at the same time, I am clear of the proposition laid down by Mr. Tait, that a man's being a creditor of the bankrupt affords no objection to his being examined under the act. The object of the examinations is to bring out the amount of the funds, the presumption is, that the bankrupt is concealing his property; and the practice of the world shows, that that presumption is often too well founded. But this is an object very different from that of ranking the debts on the estate. No claim can be admitted without examination, and that by every possible means; the present, however, is not the time of trial; it is when this creditor comes forward with his claim that it ought to suffer an investigation

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gation. It was not the meaning of the legislature that the claims should be enquired into until they were entered under the act. I had occasion, when this question was last under our consideration, to mention the 20th of his late Majesty, by which the creditors of forfeited persons were allowed to be examined on oath. But at what time was this oath put? it was when the creditor entered his claim; and unless he did enter his claim, the Court had no authority to order an investigation of it. In the same way, when the creditor on a bankrupt estate enters his claim, you may investigate it by every means; but it would have been very improper had the law allowed of an earlier investigation. It may have happened that the friends of a bankrupt have formed a scheme of defrauding the creditors, by bringing forward fictitious claims on the estate. But I shall suppose, that, after considering the matter coolly, this plan is given up, and no claim is entered, it is evident that, in such a case, the creditors can suffer no loss; an investigation, previous to the entry of the claim, could therefore have no other effect than to prove the turpitude of those who had engaged in the plan. *In hoc statu*, I am against an investigation. There will be a full opportunity of investigation when the creditor comes to claim his debt.

Lord *Abercromby*.—His Lordship observed, that it was not the object of the legislature to give the sheriff a power of investigating the claims of the creditors.

Lord *President*.—The creditor must swear to the verity of his debt, when he produces the grounds of it and votes. But what would be the consequence, were you to add to this an investigation of the claim at that time. It is not a formal expiscation, that is here demanded, but the creditor is called off the street, and all the procurators in the country let loose upon him, he makes a slip when examined in this way, without vouchers, or time for recollection, and may be then indicted for perjury. I should be sorry were this the law, and were it so, I should undoubtedly say that it ought to be altered. But our law does not, and I hope never will allow of a previous and unnecessary investigation of this kind. The claim will afterwards undergo an investigation, when it comes to be entered in this court, without that entry, and until it shall be duly ranked, the creditor cannot draw a shilling of his debt, and all he demands is, that his claim may be properly investigated before your Lordships. The demand is certainly well founded.

Lord *Esfgrove*.—When I came into court, I was of the opinion of the Interlocutor, and from a comparison of the
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English bankrupt statute with ours, and which I believe was the ground of introducing examinations into our law, I am of the same opinion; it is true the commissioners are entitled to examine the creditors of the bankrupt in England, But your Lordship explained to me that this power was constituted by a deligation from the Chancellor, similar to the power given by the court to the Lord Ordinary in the outer house and by no means similar to the jurisdiction of the sheriff. After the cause comes before your Lordships in consequence of a claim, having been entered upon oath, you allow an investigation for this oath does not preclude further enquiry; but were your Lordships not to admit of further enquiry after the claimants omitting this oath; I would rather have the examination in presence of the sheriff, than that there should be no means of examining the claimant.

State of the vote adhere or alter.

Adhere—Lord Justice Clerk,
Lord Alva,
Lord Elgroye,
Lord Stonefield,
Lord Henderland,
Lord Dunsinain,
Lord Abercrombie.

Alter—Lord Swinton,
Lord Dreghorn,
Lord Monboddo.

BILLS.

**VII. The Assignees to the Estate of Sandieman and Graham,
late Merchants in London, Claimants ;**

AGAINST

**The Trustee on the sequestrated Estate of James Stein late Di-
stilller at Kilbagie.**

Bills indorsed by a debtor before his bankruptcy, although they did not fall due until after a sequestration was awarded against him, were nevertheless found to be equivalent to payments of the date of the indorsations, seeing that the creditor was thereby enabled to raise money on them : and accordingly, in stating his claim under the sequestration, he was obliged to give credit for their amount.

In the 1783, Sandieman and Graham entered into a connection with James Stein. Stein was to consign spirits to Sandieman and Graham to be disposed of, and they were to receive two per cent. on the sales until this commission amounted to L. 1200 *per annum* ; to which sum their allowance was restricted, whatever the amount of the sales might be.

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Stein, in place of drawing for the produce of the sales only, came soon to overdraw very considerably : and it was then agreed, that for the sums he should overdraw, Sandieman and Graham should have a commission of a quarter *per cent*.

The accounts betwixt the parties were kept by Sandieman and Graham in the following manner : when the spirits were sold the full sum was entered to the credit of Stein, and in a separate column the period of the price becoming payable was entered ; in the same way, when Stein sent bills to answer his drafts, these bills were entered to his credit, and the time of payment also entered. On the other hand Sandieman and Graham no sooner accepted of Stein's drafts, than they entered them to his debit, marking on the other column the period of their falling due.

In the end of February 1788, Messrs. Sandieman and Graham found themselves so deeply involved, both by advances already made, and by acceptances for Stein, that they were under the necessity of stopping payment ; and their bankruptcy was immediately followed by that of Stein.

At the time of the Bankruptcy, Sandieman and Graham were in actual advance for Stein 51,290 l. 15 s. and had accepted bills on his account to the extent of 58,442 l. 13 s. 10 d. Sterling. On the other hand they held bills of Stein's for 39,280 l. 19 s. which, although they did not become payable till after

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the sequestration was awarded, had been discounted by Sandieman and Graham prior to that event.

Considering the 39,280l. 19s. of bills, which Sandieman and Graham held at the date of the sequestration; in the light of a payment, there remained due to them on their advances for Stein only a balance of 12001l. 16s. and accordingly the claim, which was at first entered for them under the sequestration, was for this balance, and for relief of the bills for which they stood engaged to the extent of the L. 58,442 Sterling: afterwards however, it occurred to them, that the bills for 39,280l. 19s. as they were not payable till after the date of the sequestration, ought not to be considered as payments, but as effects which they were entitled to hold in security of the money which they had advanced, and of the engagements they had come under for Stein: A New claim was therefore entered by their assignee for the balance of 51,290l. 15s. of actual advance and for the L. 58,442, for which they had come under engagements, and retention was demanded of the 39,288l. 19s. in security of these claims. But it is necessary to specify the articles of this new claim, that the judgement of the Lord Ordinary may be understood. It consisted, 1st, of the 12,001l. 16s. the balance of actual advance, deducting the deposit of 39,288l. 19s. 2d. of the 58,442l. 13s. 10d. for which Sandieman and Graham stood engaged: 3d, of the 39,288l. 19s. which had been improperly credited to Stein; and lastly, of a claim of retention over the bills which were in their hands at the date of the sequestration, as a collateral security for whatever sums they should be entitled to draw from the sequestrated estate.

It was objected to this amended claim, that the remittances were so many payments in cash which extinguished the correspondent debt *ipso jure*; that the books of the claimant proved the remittances to have been taken as cash, and that it was not possible for Sandieman and Graham after the bankruptcy to transform these remittances into effects, constituting a pledge for securing their claims again Stein.

The Court having remitted to the Lord Justice Clerk to adjust the claims of the creditors, his Lordship pronounced the following judgement: “ With respect to the first article,
“ being 12001l. 16s. arising as the balance of the account
“ current in cash, finds the claimants entitled to be ranked
“ for the said balance: sustains the objections to the second
“ article of the said claim, being 58,442l. 13s. 10d. as the
“ amount of various bills drawn by James Stein on, and accepted by Sandieman and Graham; in respect the said bills were
“ not paid and retired by Sandieman and Graham, and that
“ the present holders thereof, have all claimed to be ranked on
“ James Stein’s estate as drawers and indorsers, and therefore
“ finds that the said claimants have no title to rank again for
“ any

Dec. 9. 1789.

“ any part of the said bills : repels the objection to the third
 “ article of the said claim, amounting to 39,288 l. 19 s. being
 “ the amount of various bills and drafts, either arising from
 “ the proceeds of the sales made by Sandieman and Graham,
 “ of James Stein’s spirits in London, or remittances made by
 “ James Stein from Scotland to Sandieman and Graham, but
 “ of which the term of payment was not come at the date of
 “ the sequestration of James Stein’s estate; and finds that the
 “ said claimants are entitled to be ranked for the said sum of
 “ 39,288 l. 19 s. as well as for the said sum of 12,001 l. 19 s.
 “ as the balance of the first account, and to draw a dividend
 “ accordingly, until by the said dividend, and the collateral
 “ securities in their hands at the date of the sequestration,
 “ they are fully paid of the said 12,001 l. 16 s. as well as of
 “ the said 39,288 l. 19 s. ascertained to be the total balance
 “ due to them at the date of the sequestration; without im-
 “ puting or abating any part of the said 39,288 l. 19 s. being
 “ the amount of the bills and drafts which have been paid pos-
 “ terior to the sequestration, or any other sum which may be
 “ received after the sequestration, in consequence of any col-
 “ lateral security in the hands of the said Sandieman and
 “ Graham.”

This Judgement was acquiesced in by the claimants, in so far
 as regarded the acceptances for which Sandieman and Graham
 stood bound ; but the holders of these bills having been found
 entitled to rank on the estate of Sandieman and Graham, the
 claimants, applied to the Lord Ordinary to be allowed reten-
 tion of the effects in their hands, in extinction of such
 dividends as should be drawn out of the estate of San-
 dieman and Graham, in virtue of these acceptances; and
 his Lordship pronounced the following Judgment : “ Having”
 “ heard parties procurators on the subject of this representa-
 “ tion, and considered the interlocutor of the 9th *ultimo* there-
 “ in referred to, finds in addition to, and in explanation of
 “ that part of the interlocutor respecting the claim of the as-
 “ signees of Sandieman and Graham for 39,288 l. 19 s. that
 “ they are not only entitled to be ranked for that sum, and
 “ for the sum of 12,001 l. 16 s. making up together the total
 “ balance due to them at the date of the sequestration, and to
 “ draw a corresponding dividend accordingly, till by such di-
 “ vidend, and by the produce of the collateral securities in
 “ their hands at the date of the said sequestration, they shall
 “ be fully paid of the above-mentioned total balance ; but al-
 “ so that the said claimants are further entitled to be ranked,
 “ and to draw as aforesaid, ay and until they shall be fully
 “ paid and relieved of the amount of any dividend that has
 “ been or shall be received out of the estate of Sandieman and
 “ Graham, by the holders of their acceptances for the other
 “ sum

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June 23. 1790.

of sum of 58,442 l. 13 s. 10 d. Sterling, also mentioned in
“ the said interlocutor ”

Nov. 16. 1790.

These judgements were adhered to by the Court, on advising a reclaiming petition for the objectors, with answers for the claimants : But a second reclaiming petition having been presented for the objectors, the Court pronounced this judgement :
“ The Lords having advised this petition, with the answers
“ thereto, they alter the interlocutor complained of ; find
“ the claimants can only be ranked for 12,001 l. 16 s. Ster-
“ ling, the balance of the account current ; and remit to the
“ Lord Ordinary to proceed accordingly.”

This judgement the claimants in their turn brought under review, and the question at issue came to be, whether the bills, amounting to 39,288 l. 19 s. remitted to Sandieman and Graham prior to the bankruptcy, but which were not payable till after the date of the sequestration, and which bills had been sold by Sandieman and Graham and turned into cash, were to be held as payments of the date of the remittance, and consequently as reducing the balance of their claim against Stein ? or whether they were not to be considered rather as effects belonging to Stein, which Sandieman and Graham were not obliged to enter to the credit of Stein, but were entitled to hold in security of their full debt ? On this point the following argument was maintained :

Argument for
the Claimants.

These bills came into Sandieman and Graham's hands, as factors for Stein ; and they were bound to redeliver, or account for them on receiving payment of all their advances, and being relieved of all engagements for Stein. Thus as factors, Sandieman and Graham held these bills under a right of retention created by the law itself ; a right, which although it arose tacitly from the situation of the parties, was as strong as if it had been constituted by an express impignoration ; a right on the faith of which mercantile factors daily make advances for their constituents to the value of the effects in their possession. Now a creditor holding a collateral security, when he uses diligence on his debtor's personal obligation, or ranks with the other creditors, is not bound to make any deduction on account of his separate security. That security, whether constituted by agreement, or by the act of the law, is intended for his benefit alone : it is not meant as a benefit to the other creditors ; it is quite the reverse, it is intended to exclude them. The holder of such a security may therefore proceed to diligence on his debtor's personal obligation to the full extent ; he may arrest, poind, adjudge, &c. for the full amount of the debt : and under that diligence he is entitled to rank along with the other creditors till his whole debt be paid. His diligence and his claim under the debtor's personal obligation is as broad for the last farthing as for the whole debt ; and al-
tho'

tho' he may have received partial payments from the separate security after his diligence has been raised, his diligence remains as broad as at first till the whole debt be paid. This doctrine is established by the decisions in the cases of the Earls of London and Glasgow v. Ross, 16th February 1734, and of the creditors of Auchinbreck v. Lockwood, 21st July 1758. It is not a doctrine peculiar to the case of adjudications, as was contended on the other side; (Erskine, B. II. tit. 12. § 67. p. 410.) lays it down, that the same doctrine holds "not only in securities which affect heritable rights, but in those which are proper to moveables, as arrestments, &c." But even were it necessary for the claimants argument that they should have led an adjudication, they must be held as having done so in virtue of the 20th clause of the act 23d Geo. III. which declares, that the steps necessary for vesting the estate in the trustee shall be equivalent to an adjudication at the instance of the whole creditors. This general doctrine, respecting collateral securities, had on some occasions been called in question prior to the statute 21st Geo. III. The 35th clause of that statute, in order to settle these doubts, declares, that payments prior to the sequestration shall have the effect of diminishing the debt; but that payments made from any collateral security after the sequestration has been awarded shall not have that effect; the creditor in such a case being entitled to rank for his full debt. The claimants, holding, therefore, as collateral securities, bills not payable till after the bankruptcy, are by law entitled to retention of these bills, while they rank on the sequestrated estate for the full debt: and this was precisely the decision in the late case of Fall v. Sir William Forbes and Company.

But the present case is said to be attended with circumstances which take it out of the general rule now laid down.

I. The bills remitted to Sandieman and Graham are said to have been taken by them *in solutum* of their own debt, and to be at their risk, not at Steins: and this is said to be proved in the *first* place, by the manner in which Sandieman and Graham kept their books. This, however, is of little moment, it might have been more regular and accurate, to have entered the bills remitted by Stein, in a separate account on time, previous to the bills having been paid; but Sandieman and Graham could not surely imagine that by following a more simple plan in keeping this account, they were altering the nature of the transaction, and binding themselves to guarantee the solvency of the accepters of every bill that Stein might remit to them. *Secondly*, It was said to be proved by the allowance of one-fourth *per cent.* on the sum over-drawn by Stein. But there is no proof of such an agreement; and without strong evidence it can never be presumed. Further, to show that no such views

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views were ever entertained by the parties; Andrew M'Kenzie and Company had accepted some of the bills remitted to Sandieman and Graham; these bills were entered in the accounts betwixt the parties in the common way, and on the bankruptcy of M'Kenzie and Company, they were, without challenge, brought back to the debit of Stein.

II. The discounting of the bills by Sandieman and Graham was said to make this case altogether different from that of Fall; for the bills, on being discounted, ceased to be securities, and the money raised on them became payments to account of the claimant's debt, prior to the sequestration. In answer, it is contended that the bills in the hands of Sandieman and Graham did not, by being discounted, cease to be securities. Stein had no concern in the discounting, and it could in no shape affect the transaction between him and Sandieman and Graham. It is clear, that if Stein had sent to Sandieman and Graham an assignment to an heritable bond, or a moveable subject in pledge, Sandieman and Graham would not have been considered as having received a payment in the sense of the statute, had they, in borrowing money on their own bond or bill, given that moveable or assigned that bond in further security to the creditor: in such a case Stein's debt would have remained in *statu quo*; and Sandieman and Graham would have been entitled to rank for their full sum; yet that is the very case that has occurred, substituting only a bill for the bond or impledged moveable, which does not seem to make any difference on the case.

There being therefore no circumstances to distinguish this case, or to make the general and acknowledged rule of law above laid down inapplicable to it, the claimants ought to be allowed retention of these bills as securities, and should be found entitled to rank for the whole debt on the sequestrated estate.

Argument for
the Objectors.

It is proper, in the *first* place, to consider the situation of the L. 39,000 of remittances; they consisted of good bills indorsed and negotiable; credit was given for them as payments in cash; they served the purpose of cash. It was not the understanding of parties that they were to remain with Sandieman and Graham as effects of Steins; on the contrary, Sandieman and Graham desired those to be sent, which were capable of being instantly converted into money, and all of them turned out as good as cash. The entry of these remittances as payments was proper; and the books cannot now, after Sandieman and Graham's bankruptcy, be altered, in order to give a new aspect to those remittances, and convert them into pledges.

It

It is said, that as the term of payment did not happen till after the bankruptcy, the remittances were to be considered as effects; and that although Sandieman and Graham got money on them, still they were liable to repeat the money if the bills turned out bad: but it deserves serious consideration before the Court can adopt an argument of this kind, which alters the character, and unhinges the security of a great proportion of money transactions. Suppose that Stein had remitted exchequer bills to Sandieman and Graham, and that they had given him credit for them as cash, would the Court listen to a plea, by which they were to be held as effects only till liquidated by payment? No: the true import of the transaction would be taken into view; it would be considered that these bills were intended to serve as cash; that they were entered as such; that they were convertible at pleasure into cash; and they would therefore be held to extinguish *pro tanto* Steins debt.

As to the pretended risk, would the Court hold a remittance of notes of the bank of England, or Goldsmith's notes, as deprived of the character of cash, merely because they are not a legal tender, or because the indorser is liable in recourse? No, surely. The indorsation would not be held as creating a greater risk than the paying of coin, or delivery of a commodity, which imply a warranty that the subject is what it appears to be.

Nothing could be more pernicious to commerce than to narrow the interpretation of what is to be considered as money. The maxim is, that bills are bags of money; and the business of the commercial world is carried on by payments in paper of different descriptions, to which the name of money is not applicable.

If this question be tried on these principles, there can be no doubt about the result. The drafts of Sir William Forbes and Company possessed a degree of credit which rendered them to all intents and purposes cash to Sandieman and Graham. The risk lay not in converting them into cash, but in making the advances for Stein; the giving credit to him for the bills he remitted in extinction of their advances occasioned no new risk, for they had still Stein's security for the sufficiency of the bills.

The claimants have argued, that all effects of debtors in the hands of creditors are to be considered as securities; but what are the consequences of this doctrine? According to it, a banker discounting a bill has not merely an action of recourse; but he is a creditor *hypothecarius* on that bill as a pledge securing every debt that the discounter may owe him. The Court has always considered mercantile law as a subject of all the most delicate; and in England the most scrupulous
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attention has been paid to the true meaning and import of every transaction in the opinion of the parties themselves. All that the objectors contend for in this case is, that those remittances should be held as payments, which were considered by the parties to be payments; while the object of the claimants is, to give them a character which the parties never thought of.

The case of Sir William Forbes and Company against Fall, founded on by the claimants, is in favour of the objectors, in consequence of the distinction observed there betwixt bills deposited and bills discounted. The latter, which were in the situation of the bills in question, were considered as cash; it was the deposited bills only that were held to be securities.

The right of recourse is no solid objection to this conclusion. Bills capable of circulation are cash; and the right of recourse is not warranty that the debt exists: it is an obligation that the bills shall be cash: it thus acquires additional credit as it circulates. This obligation gives it more the character of cash; and the right of recourse is merely a right of compelling those who circulate bills as cash to make them good; but it will not entitle the receiver who has taken it as cash to rescind the transaction.

On these grounds the objectors insisted that the remittances in question are all to be considered as payments by Stein to Sandieman and Graham previous to the bankruptcy.

Further, it was objected that an *exceptio doli* lay to the claim on this ground, that by discounting the bills, Sandieman and Graham had been enabled to increase the debt against Stein L. 39000 without giving credit for the bills, which enabled them to make this additional advance.

Opinions.

When this cause came to be advised, the Lord *President* stated the question to be, Whether the bills, &c. amounting to L. 39,000, are to be considered as payments, or as effects of Steins in the hands of Sandieman and Graham?

Lord *Eskegrove*—There was no agreement in this case, by which the transmission of a bill to Sandieman and Graham could be held equivalent to a remittance in cash. The original bargain was simply, that Sandieman and Graham should sell the spirits remitted by Stein. It is true, this agreement was altered, but that alteration was not intended to render the bills which came into the hands of Sandieman and Graham equivalent to payments in cash. It never could be the meaning of the agreement, that for one quarter *per cent.* these gentlemen were to take the risk of the bills which were remitted by Stein. An agreement of this nature would require to be established by the most clear, express, and convincing evidence; neither does the mode of making up the account appear

pear to be of any importance in the present question. It was merely a matter of convenience, and can never be so interpreted, as to render a bill, the moment it came to hand, equal to a payment in cash. Suppose, that in place of bills, there had been a consignment of spirits, and that in the books of Sandieman and Graham, Stein had been credited with this consignment, surely they would not, from the circumstance of this entry in the books, be held as taking the risk of the sale on themselves; nor could it be said, that such a consignment was equivalent to cash. There does not appear to be any distinction betwixt goods and bills. The spirits were the property of Stein, whilst they remained in the hands of Sandieman and Graham undisposed of. In like manner, the bills remitted to them remained the property of Stein, and on his risk, until they were paid. Could it have been said, that the bills in question were of the nature of a bank bill, of a navy bill, or of any other obligation which passed like money from hand to hand without indorsement, the argument for Stein's creditors might have been good. But this cannot be said; for where Sandieman and Graham had occasion to raise money on these bills before they became due, it was necessary for them to indorse the bills, or, in other words, to raise the money on their own credit. From the whole circumstances of this case, there appears to be no ground for presuming, that the bills were agreed to be received by Sandieman and Graham as cash; on the contrary, it appears, that the advances made by Sandieman and Graham proceeded jointly on the faith of these bills, and on the personal credit of Stein. By the bankrupt act it is expressly declared, that the debt shall be ranked as it stood at the date of the sequestration; therefore, as the bills in question were neither paid nor payable at the date of the sequestration, they are to be considered as effects in the hands of Sandieman and Graham, and these gentlemen are entitled to rank for the full amount of the balance due to them without deduction of the value of these bills.

Lord Justice Clerk—His Lordship said, that this was a question of importance; that he had considered it well before he pronounced his judgement as ordinary in the cause, and he saw no reason for altering that opinion. His judgement proceeded on this simple ground, that a bill, which may or may not be paid, is not to be considered as money, nor suffered to diminish the claim of the creditor; the claim of Sandieman and Graham remained in full force until the actual payment of the bills which were indorsed to them, and they must be ranked accordingly.

Lord Henderland—His Lordship observed, that this was a case of great difficulty. Although bills have a certain value, and may be made effectual by being discounted, yet, in the

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case of Sir William Forbes and Company v. Fall, the Court were of opinion that the bills were not equal to money, but were to be considered merely as securities remaining in the hands of the indorsee until payment was recovered. The bills in question are of the same nature ; But what happened ? The bills were discounted ; and that not only upon the faith of Sandieman and Graham, (else Sandieman and Graham might have raised the money without these bills) but on the credit of Stein ; money received in this way, is equal to payment ; consequently to the extent of what was received on these bills, the debt to Sandieman and Graham ought to be diminished. There is nothing in the argument drawn from the form in which the accounts have been kept, the only difficulty which I have, arises from the circumstances which I have explained ; that the effect of discounting these bills, was to give money to Sandieman and Graham on the credit of Stein, and that this is equal to payment. Sandieman and Graham were liable, it is true, to repetition if any of these bills had turned out bad ; but there was no loss : the bills were retired, and the payment remains good.

Lord Swinton—His Lordship was of the opinion of the last interlocutor. Payment is defined, "*naturalis præstatio ejus quod debetur.*" The bills were in this case transmitted to Sandieman and Graham before the sequestration, they were instantly turned into money, and have they not been paid ? Bills have always been considered as bags of money ; and his Lordship, in this case, considered these bills as equivalent to payments in cash.

Lord Rockville was for reversing the interlocutor.

Lord Dunfinnan was for adhering to the interlocutor.

Lord President—His Lordship said, that he was formerly of the opinion expressed in the last interlocutor, and was still of that opinion. It has been thought strange, that a piece of paper should have been taken for cash when it might have turned out to be of no value ; but it is well observed in the papers, that the risk did not depend upon any loss that might have arisen on the bills, but rested entirely on the previous advances. What was the operation in this case ? When these bills came into the hands of Sandieman and Graham they were instantly put to the credit of Stein ; and when any of them were dishonoured they were carried to his debit : Where then is the risk attending this transaction ? Suppose, that a person wishes to make a payment to his banker in London, he purchases a bill here and transmits it : the banker places this to his credit, and sends a copy of his account. Here the banker can run no risk ; for should the bill turn out to be a bad one, he has only to put it to the debit of the correspondent, and things are just as they were. The question here is,
Whether

Whether, now that a bankruptcy has taken place, are Sandieman and Graham entitled to bring back these bills from the credit of Stein, and to hold them as a collateral security? Or are they to rank merely for the balance, as it stood on their account, entered in their books? It is then a question of ranking, and I think they must rank for the balance. If any good reason shall occur for enlarging that balance, in consequence of the dishonour of any of these bills, they will then rank for a larger sum. Are the bills to be considered as effects? It appears, from the account, what idea Sandieman and Graham themselves entertained of them; but some ingenious person has, at an after period, laid hold of the words of the act, and new modelled the claim. Sir William Forbes's case has been misunderstood. His Lordship said, he was perfectly acquainted with it, the decision was clearly founded on the act. Sir William received bills in different ways: 1st, On discount, giving Fall credit in the same way that has been done by Sandieman and Graham; and these bills Sir William never thought of bringing back to the debit of Fall, or of holding as collateral securities: 2d, As a deposit, as appeared from the entry in the Company's books. It was on these last set of bills that the decision was pronounced: but even had that question (favourable as it may seem when compared with this) occurred in our neighbouring country, the decision would not have been the same with that which we pronounced. In England a creditor holding a pledge (for when he has a co-obligant bound he is entitled to rank for the whole debt) must sell his pledge, turn it into money, deduct the amount from the debt, and claim only for the balance. Even this is an equitable rule; for at common law, he must either give up the pledge and rank with the other creditors, or keep by his pledge, and renounce all right of competition with the creditors. But such is not the law of this country; though perhaps it ought to be our law: we must not, however, allow ourselves to be influenced by such speculations; we must regulate ourselves by the act of parliament. Sir William Forbes's case came properly under that act; but the present is a very different one: here Stein remitted bills; they were received by Sandieman and Graham, they were placed to the credit of Stein, they were discounted. This shows, that according to the understanding of Sandieman and Graham, these bills were considered as cash, not as collateral securities. If any of them had turned out bad, they would have been placed to the debit of Stein, and would have increased the balance for which Sandieman and Graham now rank: but, as it is, Sandieman and Graham can rank only for the balance, after deduction of these remittances. The consignment of spirits is in the same situation; when spirits were sold by Sandieman and Graham, they were put to the credit

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of Stein : but they might have turned out ill, and Sandieman and Graham must have been liable for the price, and must then have carried the price to the debit of Stein, and ranked accordingly. Bills are truly bags of money, they may no doubt turn out bad ; but until that happens, credit must be given for them. The indorsations have been considered as conditional payments ; but this is not the just view of the matter : the question is, Whether they are to be held as collateral securities ; and we have the opinion of Sandieman and Graham, from the entries in their books, that they are not. It is a delicate and a dangerous matter to allow merchants to alter their books.

State of the vote, Adhere or Alter.

Alter, Lord Justice Clerk, Lord Eskgrove, Lord Monboddo, Lord Alva, Lord Rockville.

Adhere, Lord Swinton, Lord Stonefield, Lord Hailes, Lord Henderland, Lord Dunsinnan.

Carried Adhere, by the President's casting vote.

Lord Gardenstone and Lord Dreghorn did not vote.

For Claimants, Solicitor General,	} Advocates.	Rob. Boswell, C. S.	} Agents.
Objectors, M ^c Conochie,		John Taylor, C. S.	
Lord Justice Clerk Ordinary.		Home Clerk.	

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VIII. ADAM WATSON, Merchant in Dunbar, Pursuer,

AGAINST

JAMES RENTON, Merchant in Berwick, Defender.

The extinction of a debt ought to be regulated by the law of that country within which it is exigible ; and, accordingly, a person residing in England having contracted a debt payable in that country, and afterwards become bankrupt, and obtained the Lord Chancellor's certificate, the creditor is not at liberty to attach his person or effects here ; but when the debt is Scotch, he may enforce payment of it, notwithstanding the certificate of the Lord Chancellor.

James Renton, a native of this country, but settled as a merchant in the town of Berwick, commissioned wine from Adam Watson, a merchant in Dunbar, to the value of about L. 100 Sterling. In the commission, Renton desired the wine to be delivered to the carrier betwixt Dunbar and Berwick ; and in that way the wine was sent. For L. 76 of this debt a bill was drawn upon Renton, payable in the town of Berwick ; which bill was accepted, but afterwards dishonoured ; so that the whole debt remained due.

Within

Within a few weeks from the time of giving these commissions, Renton's affairs went into disorder; and, on the 17th of October 1788, a commission of bankrupt was issued against him. On the 2d of March following, the commissioners granted him their certificate; and, on the 1st of April thereafter it was allowed and confirmed by the Lord Chancellor. The bankrupt, at the same time, conveyed his whole estates, heritable and moveable, situated within Scotland, in favour of the same persons who had been appointed assignees under the commission of bankrupt.

On the 27th of September 1789 Watson obtained a border warrant from the sheriff of Berwickshire, for apprehending Renton, and arresting his goods, until he should find caution *judicio fisci ac judicatum solvi*. Upon an application of Renton, the sheriff, on advising the cause, pronounced a judgement, finding, "That the debt being by furnishings to the defender while settled in the burgh of Berwick *animo remanendi*, falls to be regulated by the law of England as to the extinction thereof; therefore, in respect of the copy of the Lord Chancellor's certificate produced, and not objected to by the pursuer, and that such certificate is, by the law of England, equivalent to a discharge of the debts contracted in that country, finds, that no diligence against the defender can proceed in Scotland upon the debt in question," &c.

This judgement was brought under review of the Court of Session by advocacy, and Lord Hailes, before whom the question came, as Ordinary, "advocated the cause, and affirmed the defender." The question was then brought before the Court by petition. March 5, 1791.

The judgement proceeds upon this ground, that the certificate in the commission of bankrupt, is a complete discharge of every debt contracted previous to the bankruptcy; and the argument upon which this has been supported, is, that the debt in question was an English debt, and that England was the *locus contractus*. It may be proper, therefore, to consider, I. How far the creditor, in a proper English debt, is precluded by a certificate from attaching the effects of his debtor situated out of the jurisdiction of the English courts? II. He shall then consider, Whether the debt in question be an English debt, or of such a nature as to admit of the supposed extension?

I. The Chancellor's certificate is a mere *ex parte* order of a foreign judicatory. The commission proceeds upon a supplication to the Lord Chancellor of England, its object is to prevent the bankrupt from defrauding the creditors under his jurisdiction, and the means prescribed being complied with, a certificate of compliance is granted by the commissioners;

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missioners; which being ratified by the Lord Chancellor, the effect of this ratification is declared by statute (5th Geo. II. c. 30. § 41.) to be, "That when entered on record, the certificate shall, and may be given in evidence in any courts of record, and, without farther proof taken, be a bar and discharge against any action for any debt contracted before the issuing of such a commission." This is an injunction for barring action in an English court; but beyond the territory of the judge, this order can have no coercive authority. Effect is given to foreign decrees *ex comitate*, but this is a dictate of equity, and can never give sanction to what is unjust; and a decree debarring a creditor from recovering his debt, is certainly unjust.

It has, however, been maintained, that the *lex loci contractus* as it regulates the constitution and transmission of an obligation, ought likewise to regulate its extinction. The constitution of a debt is the form authorised by the *lex loci* for expressing consent; and when that has been observed, the obligation ought to be effectual every where: the pursuer therefore does heartily acquiesce in those decisions, which have found that a deed executed in England, according to the forms of the law of that country, is a proper ground of action in this. The transmission of an English bond may perhaps be vindicated on this ground, that the assignee was entitled to rely on the prospect of obtaining an effectual right to an English debt, by the forms of transmission known in that law. But it has been further maintained, that a debt constituted in England, when sued in this country will have its endurance regulated by the English statute of limitations instead of the Scotch prescriptions. Even this might have found support in the presumption that the parties meant to regulate the endurance of the obligation by the *lex loci contractus*; but it is not good law, for the contrary seems to have been found in the case of *Renton v. Bailie* 7th July 1755, and in that of *Randal v. Innes* 13th July 1768 Fac. Coll. where the triennial prescription was sustained against an English debt.

But admitting all this, upon what principle is it to be found that the Chancellor's injunction shall annul the pursuer's claim? There is neither an express, nor a presumed consent, that this injunction shall have any such effect: indeed this injunction has not the effect of discharging the debtor, for whenever the debtor or his effects are removed beyond the jurisdiction of the Lord Chancellor, the obligation becomes demandable. If then any effect is to be given in this country to the Chancellor's injunction, it must be such only as is warranted by Justice or the law of nations; and it has been shown, that to deprive the pursuer of his right of action, is contrary to justice. *Kinloch v. Fullarton*, 12th July 1739. Dict. Decis.

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Vol. I. p. 318. In that case it was found that effects in this country belonging to an Englishman, were liable for his debts although in England the heir could not have been pursued for payment of the debt.

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From the 5th Geo. II. c. 20. §. 7. it is evident that the statute imports only an injunction on the judges and juries in England to admit of the Chancellor's certificate as a defence in any action for payment of a debt contracted previous to the bankruptcy. Indeed, it is obvious, that the surrender of the effects of the bankrupt, and the discharge which he receives are counterparts of each other, and neither can extend beyond the jurisdiction from which they both proceed. Blackst. Com. B II. ch. 30. §. 3. and 4. When a complete surrender of the bankrupt's goods has been enforced, it is just that the debtor's person should be protected; but the reason fails when such surrender cannot be enforced and that must happen beyond the jurisdiction of the English law.

Such appears to be the opinion of the English lawyers, if we may judge from the opinion of Lord Chancellor Talbot; the following case was laid before his Lordship: "A. before his bankruptcy being a merchant in London, in the way of his trade at the time he became a bankrupt, was indebted to several persons in Virginia and other plantations; whether will his certificate when confirmed here discharge him against such debts in case he went into those parts?" The answer made to this by his Lordship, when a counsel, was in these words: "The effects of A. in the plantations are liable to the commission here, and the right to them is vested with assignees: and it seems reasonable that this certificate should be equally extensive as to his discharge. However as the laws of England, since Virginia and the other plantations were settled, do not extend to them unless they are expressly named, and as the laws relating to certificates do not expressly extend to the plantations, I am of opinion, that a certificate confirmed here will be no discharge to A. if a suit is commenced against him in Virginia or the other plantations." Signed C. Talbot, Dec. 24. 1723. The opinion of another English lawyer upon this subject is in these words: "I am of opinion that the act of Parliament will not extend to any of the plantations unless they had been particularly mentioned, they being governed by particular laws and constitutions of their own making." Davies Law of Bankrupts, p. 439. Cunningham's Law Dictionary *voce* Bankrupt.

It cannot be disputed that the commission of bankrupt produces no transference of property in Scotland either heritable or moveable. The decisions are uniform upon this point, as appears from the case of *Lesly v. Scott*, winter-session 1788-9.

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The pursuer shall now proceed to state the decisions relative to the operation of commissions of bankrupt in this country : The first is that of *Rothead v. Scott*. Edgar, 30th June 1724, where it was found, that an English bond was discharged by a commission of bankrupt, as well from the *locus contractus* as from the nature of the security. In the case of *Christie v. Straiton*, 4th November 1746, and *Marshall v. Yeoman*, decided at the same time, the Court thought that in an English debt the creditor was debarred by the statute of bankruptcy, Dic. of Decis. Vol. III. p. 135. In the case of *Ogilvie v. creditors of Aberdeen*, 13th November 1747, Lord Kilkerran *voce* Foreign. Ogilvy having arrested effects in this country belonging to Aberdeen, a Scots man, resident in England, against whom a commission of bankrupt had been awarded, compearance was made for the trustees ; but the Court found that moveables in this country could be affected only according to the law of Scotland, and preferred the arrester. In the case of the creditors of *Galbraith v. Galbraith*, 1762. Fac. Col. Vol. III. No 92. and in Dict. Vol. III. p. 135. John Galbraith had become bankrupt, and obtained his certificate : he was at this time indebted to his brother George, in a debt, which was partly considered to be an English debt. He was afterwards obliged to pay certain debts, in which he stood jointly bound with George : George died soon after, and on his death John brought George's estate to sale in the character of his apparent heir. In the ranking of the creditors, John claimed those debts which he had paid for George ; when the creditors insisted that he should admit this claim to be compensated by what he was due to George at the time of his bankruptcy. John's answer to this was, that his debts to George were discharged by the Chancellor's certificate. The Court first found, that the Chancellor's certificate did not afford a defence against the debts due by John to his brother George. But on a second consideration of the matter, it was found that the certificate did afford a defence against the debt contracted in England. At the same time that this case was decided, there was before the Court the case of the assignees of *Thomson and Tabor v. Forrest and Sinclair*, Fac. Col. Vol. IV. No 54. p. 286. in which they found, " that the proceedings under " the commission of bankrupt did not bar the creditors of the " bankrupt, whether their debts were contracted in England " or Scotland, from affecting the debtor's effects situated in " Scotland, or debts due to them by persons there residing, " by the diligence of the law of this country ; and therefore " found, that such of the creditors arresters, against whose " diligence no objection is made, are preferable to the assignees under the commission of bankrupt." Upon the authority of these decisions, the pursuers maintain, that a certificate

cate of conformity, or the other proceedings following upon an English commission of bankruptcy, afford no bar to the diligence of the law of this country.

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Further, it appears from Viner, p. 116—134, that creditors who have not claimed under the commission of bankruptcy are not barred by the certificate. And the defender has admitted, that the certificate, although it frees the bankrupt, does not discharge the debt; which is allowing that this is a municipal regulation in favour of the bankrupt, and not being founded in the law of nations, or in the general principles of justice, it cannot extend beyond the territory of England.

Therefore, had the pursuer been a merchant in England, and this an English debt, he would have been at liberty to have attached the defender's effects in this country; and as personal diligence is the means in the eye of law by which the surrender of moveables is enforced, he would also have been at liberty to have secured his person. But,

II. Scotland, and not England, was the *locus contractus*. The goods were delivered to the Dunbar carrier, by the direction of the defender; they were at the defender's risk from that moment; the defender paid the carrier; so that Dunbar was not only the *locus contractus*, but the place of delivery. *Voet. ad tit. dig. de judiciis, et ubi quisque agere vel conven. deb.* Vol. I. p. 335. § 73. The circumstance of a bill's having been drawn for L. 76 of the debt is of no consequence. Had the pursuer sold a land estate to the defender, who in security of the price had granted a bill payable at Berwick, it would have been an extravagant idea to have said that Berwick was the *locus contractus*. But the pursuer need not have drawn this bill, and he may at this moment destroy it without hurting his claim.

I. In the case of an English debt, it has been settled by repeated decisions, that the certificate of conformity must in Scotland, as well as in England, be held to operate a discharge from all debts contracted before the bankruptcy. The defender however argues, that the effect of the certificate is to produce only a kind of sist of execution, and not a discharge of the debt, though he does not deny that it is a perpetual sist. But omitting this sort of discussion, the Court will observe that the statute the 5th of Geo. I. expressly discharges the debt, it declares "that every such bankrupt shall be discharged from all debts by him, her, or them, due or owing at the time that he, she or they did become bankrupt." And in the opinion of Judge Blackstone, this statute operates a discharge. *Black. Com. Vol. II. p. 483. Edit. 1771.*

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the Defender.

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Nor can we blame this part of English Jurisprudence when we have copied it into our own.

There is nothing in the statutes, nor in the opinions of Blackstone, to countenance the idea that the certificate does not operate against creditors who do not claim. It is said that a passage of Viner points towards such an opinion; but it is certain that no such notion is entertained in England; and the pursuer must have been misled by the case where a creditor, betaking himself to a particular security, is declared not to be affected by the proceedings under the commission. The reason of this English law is, that the bankrupt being deprived of his effects, and the whole disclosed under the pains of death, it is unjust that the debts should any longer remain in force against him, nor can a creditor, by lying by, and not claiming under the commission, afterwards do diligence against the bankrupt, else Bankton could never have called him "a clear man" upon obtaining his certificate.

It is unnecessary, however, to say more upon this subject, as the pursuer cannot mean to dispute, that in England the defender's certificate would be held as a discharge of the debt under consideration; but his aim is, that granting this, the Courts here are not bound to pay attention to the certificate; the debt is to be held as still subsisting.

In arguing this point, the pursuer insists, that the decrees of foreign courts will not have execution allowed on them in this country, if they can be shown to be essentially unjust; but the injustice must consist in their being disconform to the laws of that country in which they have been obtained; for the Court would not refuse execution, merely because the foreign statute upon which the decree proceeded was here thought unwise and unjust. In the case *Wilson v. Burnton and Chalmers*, 6th January 1756, (Kaim's Select Decis. No 95.) the Court refused execution on a decree of the Court of King's Bench, because it was thought contrary to justice; but the judgement was altered on appeal, because in England the decrees of Sovereign foreign courts are put in execution without admitting of any objection against them. And in an after case, (*Leacock, v. Clerk*, 7th July 1767,) this rule was followed.

These decisions are intimately connected with the present case; for if the bankrupt's producing a decree of an English court, absolving him in virtue of the statute of bankruptcy from an action at the instance of the pursuer, would have been reckoned a sufficient defence against a new action in this country, the defence founded on the statutes themselves must be equally good.

When the pursuer makes a distinction between rights founded on general principles of law common to different nations, and modified only as to forms by municipal institutions, and

and rights arising solely from the special statutes of one nation, he hurts his own cause; for since the date of the Scots bankrupt act, the right claimed by the defender is one common to both kingdoms. The fair bankrupt, who has obtained the consent of four-fifths of his creditors, receives his discharge in Scotland as well as in England; it is the form of obtaining this which makes the only distinction betwixt the two kingdoms. The effect therefore of the Chancellor's discharge comes before the Court in a shape so different from what it did in former periods, that the defender could rest his cause on the arguments which arise from the present state of things.

It has been said by the pursuer, that the English bankrupt statutes are confined in their operation to England alone; and it is very true that the Chancellor's certificate has no effect in Scotland *viribus statuti*; but this is no reason why the Court should not, from the law of nature and nations, give effect to this certificate according to the forms of our law; in the same way that a bond executed in England, in terms of an English act of parliament, would be considered as an obligation to which our courts would give effect. As to the opinion of Lord Talbot, it appears to have proceeded on the supposition that the debts were contracted and due in Virginia; but in all events it is a question of general law, which is as much within the province of the judges here as of Lord Talbot, or of any other English judge; and this Court have fixed a rule the very reverse of Lord Talbot's.

Now, with regard to the decisions:—The first is that of *Rothead v. Scott*, 30th June 1724, Edgar, where the defence on the certificate was sustained. In that case the same argument was used, which has been used upon the present occasion; and in every instance where the matter has been tried, the ultimate decision has gone in the same way. This question seems to have been very deliberately tried in the case of *Christie v. Straton* (Kilkerran *voce* Foreign, No 2.) and there the Court found the creditor bound by the certificate from recovering payment out of the effects acquired by the bankrupt after the statute of bankruptcy. The next case is that of *Ogilvy v. Creditors of Aberdeen* (Kilkerran *voce* Foreign, No 4.) There the Court preferred arresters to the assignees; but it is evident that this decision does not interfere with the former; and so far was this case of Aberdeen from being considered as contradictory, that in the case of *Galbraith*, which occurred in the 1762, the Court, agreeably to the decisions in the former cases, (although it was a most ungracious plea on the part of the bankrupt) sustained the Chancellor's certificate as a discharge of the English debt. The case, *Thomson and Tabor v. Forrest and Sinclair*, did

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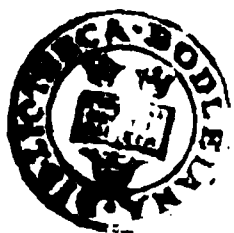
no more than find that an English statute does not operate an *ipso jure* transference of property in Scotland; and that a Scots creditor affecting the estate here will be preferable to the assignee who has done no diligence. In the 1770 this point came again to be considered in a question Stewart v. Coalston; and after being decided in favour of the bankrupt, a hearing in presence was ordered, but the cause never came to be decided. These are the whole of the authorities which appear upon this point. The result of the whole is, that the certificate of the Lord Chancellor must be allowed to operate here as well as in England a discharge of an English debt.

II. The whole of the pursuers argument on the second point resolves into this, that Dunbar in Scotland is the place where the sale must be held as completed, and is therefore the *locus contractus*. But we are not to ask after the place of the contract of sale, which was the antecedent but remote cause of the debt; but after the place of that debt itself, which surely was the town of Berwick, where the defender was established *animo remanendi*. The delivery to the carrier was but a step towards creating the debt, until the goods were received at Berwick, and accepted as sufficient, the debt was not completed. The risk of the goods, while in the carrier's hand, lay no doubt upon the defender; but that does not arise from the transference of the property, it is from the defender's having given an order to send them at a particular time, and by a particular conveyance, that he comes under that risk. This was the principal recognised in the case Christie v. Straiton. Berwick was the place in which the debt became finally due; it was there the pursuer was to look for payment; and it was to English courts, and to the diligence of the English law, that he was to apply for the means of recovering it; and accordingly the greater part of the debt is due by a bill payable at the defender's house in the town of Berwick.

These are the arguments urged for the parties in the printed papers; and a hearing being ordered, the following opinions were delivered when the cause came to be advised.

Opinions.

Lord Eskgrove—This is an interesting question. When I heard the pleadings, I was puzzled to reconcile the judgments of the Court; but after much attention, there does not appear to be any thing in them inconsistent. With regard to the effect of a commission of bankrupt over effects in this country, I am clear that a foreign statute cannot have the same effect here that it has within its own territory. Every act and deed relating to a moveable estate, executed conformably to the custom of the place where the person is resident, will be good and effectual in law. Thus, if a Scotsman shall
grant



grant a bond in France, where, in place of subscription, some other ceremony is required, the ceremony required by that law will make the obligation equally valid here, as if executed according to the form of the law of this country. By the English law, the whole estates and effects belonging to the bankrupt are declared to be vested in the assignees named by the commissioners, in the same way as if they had been formally conveyed. Now, the validity of a conveyance is to be judged of by the law of the place where it is made. This is the case with regard to private deeds, and it must hold equally in legal ones; and this is the principle which has been laid down by our decisions. It has been found, that English assignees under an act of bankrupt may appear and compete in this country, that is, they are regarded precisely in the light of voluntary assignees. If they can show that in that character they have taken any steps to give themselves a preference, they will obtain that preference. But our law does not assume the English law as to the mode of making rights effectual, though it follows it in questions of constitution. In making rights effectual, the mode of that country must be followed, in which they are to take effect. Thus, although an Englishman has an assignment to a Scots debt, a Scots creditor may arrest it, though the English assignment may be allowed to constitute a right in favour of the receiver, he must follow the measures pointed out by our law, in order to attach the Scots funds. The foreign assignee has the same right with the home assignee, nothing more. This was established in the case of Thomson and Tabor, where it was found, that a commission of bankruptcy did not *ipso jure* vest a preferable right in the assignee, nor prevent English or Scots creditors from proceeding with diligence for the purpose of acquiring a preference over effects situated in this country. In other words, the right of the assignee under the commission was in no other or better situation than that of a voluntary assignee in this country; he had no *ipso jure* preference; he had only a right, which might be made the foundation of legal diligence. The Court followed out this principle in the latest case which came before it. There was a division, but the majority was in favour of this opinion. In the case of Lestly and Scott, the English assignees had pursued the Scots debtor, upon their right under the commission of bankrupt; they obtained a decree against him for payment of the debt due to the bankrupt in England; then comes an arrestment at the instance of a Scots creditor, and in a competition betwixt the English assignee and the arrester the Court preferred the assignee. The right of the assignee under the commission was considered to be equivalent to an assignation executed by the rules of our law; it was considered as transferring the debt. The action
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at the instance of the assignee was thought equivalent to an arrestment, and the decree to a forthcoming; and it is clear law, that after forthcoming no arrestment is competent: the decree of forthcoming transfers the right. The action and decree at the instance of the assignee was held to have the same effect. This was not giving force to a statute *extra territoriam*; it was only finding that a legal assignment in England carried right to a subject in Scotland. It shows that there is not an *ipso jure* right in the English assignees; that it is merely a right which may be rendered preferable by diligences. All this relates to the competition betwixt the assignees and the Scotch creditors: but the question before us is, whether after a commission of bankrupt has been issued, where all the rules have been observed, where every satisfaction has been given to the debtor, where the commissioners have certified the bankrupt's compliance with all the requisites of the statute, and where the law has declared that he shall be a free man, and that his future acquisitions shall be his own, whether in such a case a creditor in this country, whose debt was contracted before the bankruptcy, and who made no attachment prior to that event, shall be excluded from using diligence, by the privilege enjoyed by the debtor? The certificate on which the discharge proceeds is not a matter of course; many commissions of bankruptcy are issued where no certificate is ever given. Where the debtor has concealed his funds, he can have no certificate; where four-fifths of the creditors refuse, (which they may do without giving any reason), he can have none. From the case of Thomson and Tabor it appears, that by the decisions of the English courts, the debtor has no protection from diligence during the dependence of the commission of bankruptcy, and before the certificate be given. A creditor, who has imprisoned the debtor, is not bound to let him out unless a certificate be produced; he may confine him all his days. The debt is not voided by the commission. The only consequence is, that if the creditor persist in the attachment, if he refuses to depart from it, he can have no share of the effects; he may go on and make what he can through the pains of imprisonment. But law allows a creditor to appear before the commissioners, and prove his debt qualificate, to the effect (without passing from his diligence) of being entitled to an assent or dissent in the question of giving the certificate; for it is the consent of four-fifths of the creditors in value which alone can entitle the bankrupt to his discharge. The creditor then is always at liberty to follow out his diligence, until the certificate gives the debtor his release, and frees him from diligence. Now, is the debt here so far a subsisting debt that it entitles the creditor to pursue, notwithstanding of the certificate obtained by the bankrupt? If this were an English creditor,

ditor, it would not be enough that he had not claimed before the commissioner of the bankruptcy. The discharge operates against all who did not claim, as well as against those who did; it bars every one from attaching the person or effects of the bankrupt. In this case the creditors never appeared before the commissioners; but if the commission reach the present debt, the question is decided. The creditors are Scotch, but what are their debts? In Thomson and Tabor's case, the creditors were found to have right to do diligence, whether the debts were contracted in England or in Scotland; and there is no inconsistency in this. The place of contracting the debt does not regulate the execution on it in a foreign country: It is the same thing as to execution, whether the debt be contracted in Scotland or in England. This was exactly the question in Thomson and Tabor's case; and the Court found, that diligence used in Scotland was not affected by the law of the places where the debts were contracted. But as to the discharge of a debt, it is a sound principle, that as the law of the place of granting regulates the validity and forms of constituting the obligation, so must that law also regulate its extinction. There is some difficulty, where there is one place of constituting the debt, and another of performance: it may be doubted whether the law of the one place, or of the other, ought to regulate the extinction. There must in such a case be a departure from the former rule; for though the debt be contracted in England, if it be preferable in Scotland, there is a presumed reference to the Scotch judges, whether or not it be well performed? It is a debt which is to be judged of by the law of Scotland. Put the case, that the debt was contracted in England, and that the performance is also in England, it is consonant to common sense, that when a discharge of that obligation is to be granted, the law of England should say what is to be the form: And it follows, that where that law points out a certain kind of discharge, that discharge will be effectual: a judicial discharge confirmed by the Lord Chancellor is in England the same with a voluntary discharge by all the creditors; if four-fifths consent, it is a discharge, not from the consenters alone, but from every creditor of the bankrupt. It is therefore the duty of a Court to inquire into the nature of the debt, and the law by which it is to be extinguished. If there be an express written agreement, that the law of England shall regulate the debt, the Court will not cut that agreement down, and apply another rule: But an implied agreement is equally strong; here the bills were drawn for furnishings made in England, and they were payable in England; they are therefore English debts as much as any debts can be. All our decisions, from the case of Edgar downwards, have proceeded

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ceeded on the footing of the debts being English debts, debts contracted and payable in England. On this principle the Court all along proceeded in every one of our decisions. These cases are well decided, nor have the judgements been impeached: when we decide in this way, it is not *vi statuti* that we refuse action; but from this, that by the agreement of parties, the judicial discharge precludes the Scotch creditor from proceeding with diligence.

Lord Henderland.—Besides the municipal or statutory law of particular states, there is a more general and universal law, that of nature and of nations. This universal law is governed by principles founded in our nature, and applicable to all mankind. Thus, in the law of nature, marriage, and the relation and reciprocal duties of parent and child, are governed by general and universal principles. By the same law, the great principle *fides est servanda* is acknowledged as the foundation and basis of all contracts. Now, wherever the statutory regulations of any state are founded on these great principles of natural law, they ought to be considered as effectual in another country in deciding on a question where a native of the enacting state is concerned. This is the rule by which we are to determine where to give effect to the laws of another country. In marriage, for example, which is *juris gentium*, wherever it has been contracted, according to the law of the country in which it was entered into, we must give effect to it. A deed of transmission of property, in the same manner, you will acknowledge as effectual when formal by the law of the country where it has been made: And in general, as to all contracts, you will give them force where the forms of the place where they have been entered into have been observed in their constitution, and this on the principle mentioned above *fides servanda est*. The same rule holds with respect to discharges, and for the same reason: you must, in judging of a discharge, follow the law of that country where by the original agreement execution was to be demanded. This puts the matter on a broader footing than mere *comitas*. Voet and several learned civilians lay it down, that no law of a foreign country can operate in another, of itself, and independently of the permission of the legislators of that other; and this they confirm by Paulus's rule, *Extra territoriam impune non paretur, ac pari in parem nullum competit imperium aut cogendi potestas*. They then consider how far real personal and mixed statutes have been admitted into foreign countries. As to personal statutes they say, that there is no reason why one who is by the peculiar and perhaps improper law of one place held to be infamous, should be regarded as infamous all the world over. Enquiring into the effects of bankruptcy, and whether a *curator bonis* to a bankrupt shall have the management of all his subjects

jects wherever situated, they say that nothing is decided on this question by general principles, but that in federal states of Holland it is fixed by particular regulations.

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In this particular case, what has the Chancellor done, and what did he intend to do? It is clear that he intended no more than to give a discharge in England with respect to effects in England; that he intended no more is clear from his having a power to do no more; for he could not grant a total discharge, equal to a discharge by payment. It is obvious from this, that the extent of his conveyance, and of the discharge must be *equiparent*. Therefore, it is plain, that the discharge must extend only to diligence in England: his power reaches no farther: by taking away the obligation to pay, he would take away my right, he has no power to do so. If you extend his power this length, you do what the legislator alone can do; since then he has not taken my right away, what effect has his discharge? It prevents the creditor from going to England, for the debtor has there a privilege not founded on common law; not resting on the law of nature or nations, not proceeding on the consent of the creditor: this privilege may be a very beneficial one to England; but does it depend on any principle of the law of nature or of nations? No; where then is the reason that would extend it? it is municipal, nay, it is contrary to the common rules of the law of the country where it takes place. There is, therefore, no ground for extending the privilege which has been given to a trader in England when the man comes into this country. It would be impossible to bear such a load of municipal laws as would flow in upon us, were such *comitas* to be admitted; were we to give effect to municipal regulations merely because they are effectual in another country without enquiring whether they be consistent with the principles of the law of nature. This is said to be an English debt, for it is payable in England; but is that the only place where it is payable? if so, there is something in the argument; but it is a debt due by bill: It is not an English debt, it is not payable in England alone, nor is it regulated alone by the English laws: If the debtor go to France, can I not demand payment there, or in Scotland, or any where else? If then it be in the common case a debt demandable any where, bankruptcy can make no change on it. The *locus contractus* does not even make a *forum*, unless where the debtor is found there, which is an accidental circumstance. But where I have not renounced my debt, nor the right of demanding it, the mere circumstance of the payment being barred in England, is not sufficient to imply my consent to the Chancellor's certificate.

Lord Monboddo—This is an English debt; the beginning of it was in England: The law of prescription would discharge
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the debt in England; it must, for the same reason, be discharged by the Chancellor's certificate.

Lord *Justice Clerk*—This is a great and a general question. That intercourse which trade has introduced, has given rise to nice questions of competition betwixt the laws of different nations, in which it is not always easy to determine by what law a contract is to be governed. Respectable authors have treated the question. A foreign writer, of great reputation, has given a treatise on the subject, which he calls "*conflictus legum*." He there treats some questions of nicety; but he has given his book a very wrong title: there can be no *conflictus legum* among civilized nations. A person may have a *forum* in different countries, and the same question may therefore fall to be determined in different states, but the decree will be the same in all of them; if the judgements be different, some of them must be wrong. Though much has been said about *comitas*, it is an improper term; there is no such thing as a decision from complaisance. Where judges determine by the law of another country, they do it *ex justitia*; they are bound to do it. In questions of jurisdiction for instance, England and Scotland have different laws; but if a man dies intestate in Scotland, the English will not regard their own law, but ours, in deciding on his succession. They commit injustice if they determine by the English law: "What is the Scots law?" ought to be the very first question that they ask; if they do otherways, they do wrong. The judgement of English and Scots judges, in such a case, ought to be the same. As to property, and how far it is conveyed by bankruptcy in England, it must be the same. There are two modes of constituting rights; the act of the proprietor, and the act of the law. If a man grants a deed, he gives a right; and the receiver may go and make it effectual wherever the granter has a *forum*. By the act of law there is as clear a constitution of a right so far as it goes; but it has no farther effect than to convey subjects under its own jurisdiction: we cannot adjudge Irish or English estates. It is the same in a sequestration, it cannot affect English subjects: So commissions of bankruptcy cannot vest effects not subject to the jurisdiction of the Court from which they are issued. The principle is universal, that *extra territoriam impune non paretur*. His Lordship doubted how far English assignees of bankruptcy should be allowed to compear and compete: The commissioners under the commission of bankruptcy do not convey the subjects belonging to the bankrupt to assignees, the bankrupt is laid under an obligation to convey. His creditors may enforce this by imprisonment if he does not convey; the assignees may come here and urge the obligation to convey; and they will obtain a decree here holding the conveyance to be made, and giving them

a right; and they will be entitled on this to proceed with diligence; yet a contrary judgement was given. But that does not decide this case. It is a different question, Whether a right be wholly or in part conveyed, and what the effect of that conveyance is when complete? In a question of constitution, the Court will ask, Whether the conveyance be valid? If not by the law of this country, Whether it be good by the law where the obligation was made? If so, it is a good deed: For how can it become ineffectual, merely in consequence of the debtor changing his residence? Effect must be given to such obligations all the world over. But in a question of extinction, as the law of the place where an obligation has been granted, or a debt contracted, regulates the constitution of the obligation, or of the debts; the law of the place where it is to be professed, or where the debtor is domiciled, must regulate its discharge. If the obligation or debt be discharged by the law of that place, every country will give effect to the discharge. In this country a written deed cannot be taken away by witnesses; but the law of England is otherways: Suppose then that a debtor resides in England, his Scotch creditor goes and receives payment before witnesses, he afterwards finds the debt or in Scotland, and pursues him, the debtor alleges payment; the Scotch creditor cannot, in such a case, pretend to maintain that no proof of payment by witnesses can discharge a bond; for by the law of the place, where the debtor had his domicile, and where the debt was paid, a proof of payment by witnesses is good, and by that law the question must be tried. Then we come to Lord Monboddo's case of prescription: A man in England grants a deed prescribable in six years, the creditor will not be entitled to claim in Scotland after the expiry of the six years, although here there be no such prescription, for the Court will apply the English law. The Chancellor's certificate is as effectual a discharge as payment is, with respect to all debts due by an Englishman living in England. The creditor cannot attach a debtor who has such a certificate in England; must not we also protect him? I have a *res judicata* in England, freeing me from a demand; I come to Scotland, can I be taken up there on an action upon the same ground? No. A *res judicata* is good all the world over. The courts here would have no right to review this final judgement. On the other hand, if I want execution on an English decree, the other party cannot defend himself against it otherways than by showing that the decree is unjust by the law of England. If the decree be liable to review, it must be reviewed in England; if there be a judgement in the last resort, it can go no farther. A man cannot be forced to go through every country in Europe with his defence.

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Lord Swinton.—The certificate gives a *jus ad rem*, although not a *jus in re*. This was an English debt, it is true, but Mr. Watson was not an English creditor; he was not obliged to know what was done in any court of law in England; there is not a *res judicata* against him; he was not a party to the proceedings in Chancery.

Lord Dregborn.—The discharge in this case was in consequence of local and statutory regulations, by which it is provided, that a bankrupt, in certain situations, shall be made clear. It is a regulation adverse to justice; the legislature has made it for reasons of policy. It is clear that the certificate cannot be sustained in this case out of the country where it was meant to operate.

Lord President.—This question is quite open. It is not determined by any of the decisions of this Court: the judgments in Galbraith's case were contradictory. Some eminent judges (Pitfour, &c.) gave, in Stewart and Coalston's case, the opinion delivered by Lord Dreghorn. A hearing was ordered, but the cause went off without a decision. We now take up the question where it was at that time left. Kilkerran, in his Reports, (a valuable book in our law) takes notice of two decisions, from which more information of the opinions of the judges is to be got than can any where else be met with. A distinction is to be made here; but let us first take up the collateral argument. If a foreign court should give a decree, ought you to give effect to it? See Kaimes. This was tried in Fraser of Strichen's case, a few years ago, and a rule was then laid down which is to be followed. The judgement of the House of Peers, 4th March 1771, was, that a decree in Jamaica was to be received in Scotland as evidence *prima facie* of a debt, and the defendant must shew the contrary. This I think is a fixed rule: The decision was in Lord Mansfield's time. As to the case of prescription, it comes more closely to the present question; but it is to be determined by distinctions. If the parties are both Englishmen, and have continued resident in England during the term of the English statutory limitations, they will in vain sue one another in Scotland after that term. The Court may say they are not bound by the act of prescription in England; but if they should decide against it, they would do injustice, and this not so much *vi statuti* from the mere force of an English statute, as from the implied agreement and conduct of parties; for having once submitted to an extinction of the debt by the law of their own country, the claim cannot justly be revived elsewhere. But if the debtor takes up his abode in this country, before the term of the English limitations, the Scots law of prescription will thenceforward attach upon him, and not the English law. As to the case in hand, if there be a *locus solutionis* mentioned, it
may

may be admitted that the law of that country ought to be looked to as regulating every question concerning the payment. But suppose an English merchant commissions goods from a Scots merchant in the usual way, the latter is entitled to recover his payment when and where he best can. The debtor is said to be discharged: Why? the creditor has not got payment. But it is answered, the Chancellor has discharged. It is natural to ask, What has he to do with it? He may as well employ my property in cutting a canal or making a bridge, &c. Here the debt would be discharged without the creditors receiving a shilling. Why did he not go to England? or, in the case which stands next in your Lordships roll, why did not the creditor attend to his interest in New-York? The statute at New-York allows an application to the Court, which authorises an advertisement for liberty; if there be no opposition, the debtor is liberated after six days. How can a creditor here know of this? How can he hear of it? There may be good reason for such a law in New-York, and in the situation of that country; but if you were to employ the quickest conveyance that we can conceive to bring notice from New-York, it would take more than six days to cross the Atlantic. In that case, the remittance was to be made to Scotland: the creditor was not obliged to go to New-York, nor to employ an agent there to receive his money. The payment was actually made here, but it was a bad payment; it however shows at least the understanding of parties. The creditor in such a case can be precluded from following the legal course of diligence for recovering his debts, only by a most absurd and unjustifiable law. With regard to Watson and Renton's case, there is a distinction as to the bill payable at Berwick. The creditor is not entitled to a decree for it here; it is an English debt. This is according to the stipulation of parties; they agreed (by appointing the place of payment) to all the regulations, all the dangers of recovering the debt there. If in England, a creditor, who has neglected to prove his debt, be bound by the certificate, I think, as to this part of the debt, that it is in the same situation; for the creditor was a temporary subject of England; but as to the other part of the debt I think differently.

Lord *Henderland*.—In writers (Huber) prosecution is laid down as regulated by the law of the place of payment, because the creditors agree to the execution of that law. Voet refers to his father's treatise; as to my own opinion I am doubtful. I formerly said that no foreign statute of itself is entitled to execution here, unless it be founded on the law of nations, or authorised by the express or implied consent of the parties. Prescription is *juris gentium*.

Lord *Monboddo*.—A court must sustain prescription, according to the law of the country where the creditor resides.

“ The

CASE
VIII.Judgement.
Jan. 21. 1792.

“ The Lords having resumed consideration of this petition
 “ and answers, and heard parties procurators thereon, *find*, that
 “ the Lord Chancellor’s certificate of conformity, obtained
 “ by the defender James Renton in England, does operate as
 “ a proper discharge, so as to bar action in this country as to
 “ Mr. Renton’s accepted bill for L. 76, being the principal
 “ debt deponed to in the information, whereon the border
 “ warrant in question proceeds; and so far refuse the desire
 “ of the petition, and adhere to the Lord Ordinary’s inter-
 “ locutor. But as to the other debt of L. 24 Sterling, con-
 “ tained in the account in process, *find*, that the Lord Chan-
 “ cellor’s certificate does not operate as a proper discharge,
 “ so as to prevent the execution of a border warrant, or an
 “ action in this country.”

For the Pursuer. Wm. Stewart, }
 Defender, Wm. Miller, } Advocates.

Alex. Frazer, }
 John Hume, C. S. } Agents.

Lord Hailes Ordinary.

Colquhoun Clerk.

Vol. IX. No. 5.

BILLS.

* I. CAMPBELL

AGAINST

CAMPBELL.

A Bill granted under a condition is null.

Lord Herderland reported to the Court the case of a bill which was payable only in a certain event. It had been objected to on this ground, and his Lordship, by the advice of the Court, sustained the objection.

C A S E

I.

Lord Justice Clerk—Bills are indispensably necessary for the purposes of commerce; but they are not to be sported with. In transactions where bills are not absolutely necessary, they have no title to much favour; for they are of all documents of debt the most easily forged. The act 1772, which introduces the sexennial prescription of bills, is, in this view, an excellent statute; but were we to give our support to bills, where the time of payment is made to depend upon an uncertain event, these bills would not fall within the operation of that act. They might not be payable for forty years.

Opinions.

Lord Eskgrove—The Court has hesitated to support a bill where the term of payment was remote, because it was a deviation from the proper nature of a bill; but the present case is ten times worse: Thirty or forty years may elapse before the existence of the condition on which the bill depends.

From the Bill Chamber.

* There are no printed papers.

II. The STIRLING BANKING COMPANY, Chargers;

AGAINST

The Representatives of JAMES DUNCANSON, Tenant in Manor, Suspenders.

An execution of a horning, reduced from informality, was not sustained as evidence of an intimation of the dishonour of a bill.

James Guild, in order to support his credit, prevailed with James Duncanson to put his name on a bill as indorser. The bill

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II.

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II.

Answer for the
Complainer.

In answer to this, the suspender said, 1. That he received no intimation of the dishonour for six weeks after the date of the protest.

2. That the conversation with Telfair was on the 10th of April, as appeared from the deposition of the person in whose house they met, and who fixed the precise time by entries in his books, and other circumstances, which prevented the possibility of a mistake: that the 10th, and even the 8th of April, was beyond the fourteen days from the date of the protest, which was taken on the 22d of March preceding; but in fact no such information was given by Telfair at that time.

3. That Nimmo talks only of a cursory conversation which had taken place two years before his examination; nor does he pretend to say that the suspender told him he had received the charge; this is only an inference made by the witness; and as he has not given the expressions from which he was led to draw this inference, it can have no weight. Besides, this was a man of the very worst character; he was apprehended as guilty of having forged a bill of suspension, and sist on it by Lord Ankerville; he was liberated on caution; but he allowed his bail bond to be forfeited, and has fled the country.

Opinions.

This cause was reported by Lord Eskgrove. From inspection of the execution of the horning, it appeared clearly to be a forgery; the name of John Frazer, one of the instrumentary witnesses, was evidently written by Balbirnie.

Lord *Justice Clerk*.—It is true, that a false execution cannot be founded on in any case where creditors are concerned: But it is a very different question, how far it is still to be considered as affording evidence of the intimation of the dishonour of the bill to Duncanson. No particular form of intimation is required. A letter put into the post-office is sufficient; and that although it never came to hand, if it be proved that the letter was actually put into the office. When the parties reside in town, a message, or even a conversation at the cross; all and each of these cases have been sustained in this Court as good intimation of the dishonour of a bill. It is proved to have been a common practice with Balbirnie, to make two of his neighbours put down their names as witnesses to his executions, without having been present, or having seen the charge delivered: But we have no proof that it was his practice to return executions where no citation whatever was given. The fact indeed is proved by the evidence of Nimmo, that the suspender actually acknowledged his having received the charge; and if he received it, although it might have been informal, it was a sufficiently good intimation of the dishonour.

The Lord *President* observed, that Nimmo was banished, and his evidence could not be received.

Lord

Lord *Dreghorn* thought that there was evidence of the suspender's having got information: But that he had taken advantage of Balbirnie's practice, on which to found his reasons of suspension.

Lord *Eskgrove*.—I am clearly of opinion that the intimation of the dishonour of a bill may be made without any precise form. But private knowledge, without information from the holder, is not sufficient. Therefore I pay no attention to Telfair's evidence, from whose conversation with Duncanson it is inferred that Duncanson was acquainted with the dishonour of the bill. Intimation is an act declaring, that the holder of the bill is not to lose his recourse. The Stirling bank must have given this information, in order to have shown their intention: It is not enough to say that the suspender had private knowledge of the dishonour. The chargers might not have intended to preserve their recourse, and without intimation there is no evidence that they did. It therefore comes to this question, whether this execution is to be held as sufficient evidence? and I do not consider myself at liberty to hold it as evidence of any kind after the Court has found it to be a false execution. If it be false, I must throw it entirely out of my view; it cannot be supported by the evidence of Balbirnie, or of Glas, else it would have been a good execution. But it has been found to be a false one. Then I come to the evidence of Nimmo; but he should have given the reasons why he thought that Duncanson had received intimation of the dishonour within fourteen days from the date of the protest: he has not done so; he has sworn merely to an opinion, not to a fact: he ought to have given the grounds of that opinion. This witness is under *mala fama*, and could not now have been allowed to give his evidence; but had he been a most unexceptionable witness, I should have demurred at taking his single evidence of the fact; and I confess I am not sorry that the Stirling bank, who have had so many transactions with the Guilds, should suffer from their connection with Balbirnie.

Lord *President*.—It is a mistake to suppose, that Nimmo says a charge was given to the suspender of the date of the charge under consideration of the Court. But he is not a proper evidence; Balbirnie the messenger swears that he executed the horning in terms of the charge which he returned; but it is clear from other parts of the proof that he did not: I cannot therefore sustain this man's evidence as a proof of the intimation. The same observation applies to the evidence of Glas. For these reasons, I do not think that we have a proof of intimation of any kind. I should have no objection to sustain a verbal intimation of the dishonour within the fourteen days, if I saw a proof of such intimation; But there is none;

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II.

And on the whole, I am clear that no intimation was made to the suspender within the time prescribed by law.

Lord *Monboddo*.—From what I have heard, I am clear that this execution can afford no proof of an intimation having been given.

Judgement.

The Court suspended the letters simpliciter, and found expences due.

For Chargers, R. Hodgson Cay, }
Suspender, D Cathcart, } Adv.

R. Jamieson, C. S. }
J. Somerville, } Agents.

Lord Eskgrove Ordinary.

Menzies Clerk.

VOL. IX. No. 9.

III. ALEXANDER ORR Pursuer,

AGAINST

ROBERT TURNBULL Defender.

An Indorser of a Wind Bill is entitled to plead the want of due negociation in defence of an action for payment of the bill.

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III.

Thomas Turnbull drew a bill, payable in three months, on Alexander Brown and James Turnbull for L. 81. This bill was accepted by Brown and Turnbull, indorsed by the drawer to John Lawrie, by Lawrie to Robert Turnbull, and by Robert Turnbull to Alexander Orr, with whom it was discounted. It appeared from the deposition of Robert Turnbull, that Thomas Turnbull the drawer and he were present when the bill was discounted; that he paid no value to the preceding indorser; that he exhibited his subscription in presence of Orr; and that he then delivered the bill to the drawer, who received the value of it on discount from Orr.

This bill fell due on the 6th June 1788, and was that day regularly protested; the protest was recorded in September following and horning raised, and on the 1st April 1789 the horning was executed against Robert Turnbull. No further step appears to have been taken by Alexander Orr, who died in March 1790.

Alexander Orr, the nephew and general disponee of Alexander Orr deceased, brought an action in June 1790 against the drawer and indorsers of the bill. At this time the whole persons concerned in the bill had become bankrupt, excepting Robert Turnbull, the last indorsee; and a defence was given

in

in for him, stating that the bill had not been duly negociated, so as to preserve recourse against him, he having received no intimation of the dishonour for a long time subsequent to the period required by law.

The above circumstances were all that had come to the knowledge of the pursuer; and as there was no proof of the defender's having received intimation of the dishonour of the bill, until he was charged on the morning, at the distance of nearly a-twelvemonth from the time at which the bill fell due, the Lord Ordinary decerned, affoizied from the conclusions of the libel, and found expences due. This judgement was brought under the review of the Court by petition.

It has been admitted, that this was not a bill in the ordinary course of business, to which the common rules of negotiation can apply, but what is called a wind bill. Now, the only reason why recourse is denied upon bills not duly negociated, is, that the drawer, meaning to take his effects out of the hands of the person drawn on, cannot, after the draught, make any demand on him until the dishonour be notified. This notification is therefore incumbent on the parteur, that the drawer may take the proper means for recovering his effects. Should the parteur neglect this, he is justly denied his recourse, because he has deprived the drawer of an opportunity of recovering. But this reasoning cannot apply to the case where the person drawn on has no effects in his hands belonging to the drawer; the drawer in such a case is truly the principal debtor, who must be ultimately bound; the acceptor is a cautioner, who, if he pay, has recourse on the drawer, and if he do not, the drawer suffers no damage from want of intimation. Accordingly, one distinction betwixt real and wind bills has been admitted; the drawer in the former of these cannot object to undue negociation. Erskine, B. 3. tit. 2. § 24. Feb. 1731, M'Kenzie of Inchcoulter. June 14, 1787, M'Adam against M'William.

Every new indorsation is in fact a new bill; Kilkerran, (*vix* bills of exchange) No 13. The defender being therefore in the knowledge of the nature of the bill, and a principal party to the transaction, comes in the place of the drawer of a wind bill, and is no more entitled to plead want of intimation of the dishonour than the original drawers would have been.

The rules of strict negociation have been introduced in favour of commerce; but accommodation bills are a perversion of bills from the best to the worst of purposes, and have no title to favour.

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Argument for
the Defender.

The principle of the authorities founded on by the pursuer is this, that rules of negotiation are adapted to cases where there is an obligation on the person drawn upon, which the drawer may render effectual; but that they do not apply to a case where the drawer has no claim. The defender is willing that his plea should be judged of by this standard; for unless his indorsing the bill gives him a claim against the drawer, and all the previous indorsers, his defence has no foundation; and the converse of the proposition will equally hold, that if he be entitled to relief, he has a right to demand due negotiation. As it cannot be denied then that the bill was an effectual document to the defender against the drawer and previous indorsers, he had a *jus crediti*, and is entitled to insist that the rules of negotiation ought to have been observed.

The doctrine laid down by Erskine, and approved of in the decision of M'Kenzie of Inchcutter's case, establishes, that where one draws a bill on another, who has no effects of the drawer's in his hands, he is not entitled to found on the plea of undue negotiation; because there was nothing which intimation of the dishonour could have enabled him to secure. Neither will it be disputed that the drawer of an accommodation bill is truly the debtor, and liable in relief to the accepters, although intimation of the dishonour was not given, seeing he can have suffered no loss from the neglect. But the distinction betwixt the drawers and indorsers of an accommodation bill is manifest; the former having no relief to operate, whereas the latter, should he pay the debt, may recover from the drawer or any of the preceding indorsers: and this interest is the true criterion by which to judge of the plea of undue negotiation.

It is not necessary that the defender should establish an actual loss from the want of due negotiation; the law, from motives of conveniency, holds the possibility of a loss to be equivalent to its actual existence: but, in point of fact, the drawers and indorsers were solvent when the bill fell due in June 1788; and in April 1789, when the horning was executed against the defender, they had all become bankrupt.

Opinions.

Lord *Justice Clerk*—There is here no evidence of due intimation having been made. It is no answer to the plea of undue negotiation, that Turnbull put his name on the bills without having received value; for if he had paid the bill, he would have been entitled to relief, and intimation would have been necessary to enable him to operate that relief.

Lord *President*—This young man's father was the drawer; the bill was discounted to raise money for the father, and he
received

Lord Justice Clerk.—When the indorser of a bill hears nothing of it for some time after the term of payment, he is entitled to presume that it has been paid, and he gives himself no trouble in looking after the acceptor; whereas, if regular intimation of the dishonour of the bill be given to him, he has an opportunity of taking the necessary steps for securing his relief; hence in the common case, without intimation the indorser cannot be made liable. In this case, the parties saw circumstances are in my

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III.

they be able to pay, where is the turpitude? There can be none. A man accepts a bill without value, in order to set it into the circle; he gets a letter or back-bond from the holder; if that bill be allowed to lie over, may he not say I gave it for the purpose of being discounted, but not that it should lie as a security. When it goes into the circle, the holder comes against the acceptor, because he is liable *ex contractu*; if there is no value in the hands of the acceptor, he may come against the drawer likewise without negociation. The holder can recover from the drawer on the *species facti* that no value was in the hands of the acceptor. But had an indorser paid, might he not have come against the acceptor? he trusted to the credit of both drawer and acceptor surely, and therefore there must be due negociation, else the indorser is not liable.

Lord *President*—Whenever the bill comes into the circle, I can have no doubt. We are not here in a question where that point can be properly tried; it has not been argued: but I shall, when it happens, suggest my doubts to the Court. I think that when a name is put upon a bill, not in the common course of trade, the indorsers must be held to be mere cautioners, and not entitled to due negociation.

Judgement.

The Court refused the petition, and adhered to the judgement of the Lord Ordinary affoizying the indorser.

For Petitioners, R. Hodgson Cay } Advocates. Archibald Douglas, } Agents.
Defender, Robert Corbet, } George Imloch, }

Lord Henderland Ordinary. Mitchelson Clerk.

VOL. IX. No 7.

IV. POOR IRVINE †.

An indorser's private knowledge of the dishonour of a bill found to be equivalent to a regular intimation.

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THIS appears to have been an action of recourse against the indorser of a bill, where, although no regular intimation of the dishonour was given, yet from private knowledge the indorser knew of the dishonour. The Lord Ordinary had found him liable; which judgement being brought under review of the Court, they adhered to the Lord Ordinary's judgement, and found the indorser liable in expences.

† There are no printed papers in this case.

Lord

Lord Justice Clerk.—When the indorser of a bill hears nothing of it for some time after the term of payment, he is entitled to presume that it has been paid, and he gives himself no trouble in looking after the acceptor; whereas, if regular intimation of the dishonour of the bill be given to him, he has an opportunity of taking the necessary steps for securing his relief; hence in the common case, without intimation the indorser cannot be made liable. In this case, the parties saw each other every day, and the whole circumstances are in my opinion equivalent to a regular intimation.

Lord Swinton considered diligence to be absolutely necessary for keeping a bill alive.

The *Lord President* observed, that confessedly diligence was not necessary to keep a bill alive against the acceptor; and for this reason, that the acceptor cannot fail to know that it has not been paid. The case of the indorser in this case is precisely similar, since he knew from circumstances that the bill was dishonoured. It is established in particular, that this indorser was present at a meeting where the acceptor made a partial payment to account of the bill.

On the point of expences, it was objected by the council *Expences.* for Irvine, that he was on the poors roll, and consequently that no expences could be awarded against him. The Court, however, found that this circumstance afforded no protection to a party where he had occasioned an unnecessary expence. They therefore found expences due.

V. Messrs. PERCHARD and BROCK Merchants in London, and
their Attorney; Pursuers,

AGAINST

JAMES, BRECKINRIDGE, and others, Defenders.

A bill for the price of smuggled goods, is not liable to any objection in the hands of an onerous indorsee; but the indorsee must answer every question tending to prove the nature of the transaction.

AGNEW and Shephard merchants in Guernsey, had furnished Breckenridge with contraband goods to the value of 44 l. 14 s. Sterling; and for this sum Breckenridge gave his bill payable to Messrs. Perchard and Brock the pursuers. This bill, with some others in a similar situation, were sent by Agnew and Shephard to Perchard and Brock, with whom they had connections

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Aug. 1789.

tions in trade, and to whom they owed a balance, exceeding the value of the bills.

Nov. 27. 1789.

Perchard and Brock brought an action against Breckenridge and the other accepters of the bills for payment of the contents. The defence was, that the pursuers were the factors, or at least the gratuitous *porteurs* of Agnew and Shephard; and consequently that every defence competent against the drawers was competent against the pursuers; and in this view the defenders pleaded the nature of the transaction as an effectual bar to the suit. The Lord Ordinary appointed the pursuers “to give in a condescendence, specifying the goods for which the bill was granted having been shipped by them, and the date at which they were shipped, and the nature of the goods.” But on advising a representation against this judgment, with answers, his Lordship, “in respect the bill libelled on bears for value, altered the former interlocutor, and decerned in terms of the libel, reserving to the defender to redargue the bill by the writ or oath of the drawer.” Against this interlocutor a petition was presented for the defenders*.

Opinions.

Lord *Eskegrove*.—A bill, tho’ arising from a smuggling transaction is good in the hands of an onerous holder. But where the onerosity is referred to the oath of the holder, as has been done in this case, the holder ought to speak out. He must not only answer the general questions, but he must also explain every circumstance tending to show the nature of his title.

Lord *President*.—It is evident that these gentlemen meant to hold this bill in the character of factors. The question does not occur here, how far a foreigner is affected by the smuggling laws of this country, (a question which was lately very solemnly decided by the court) for Guernsey where the drawers reside, is in the British dominions. It is customary for people, residing at a distance to have factors in this country: from the circumstances of this case, the pursuers appear to have acted in the character of factors for Agnew and Shephard, and to have held the bill in question merely as their agents. Perhaps there may be a general balance on their transactions in favour of the pursuers, but that does not appear to me to be a sufficient ground on which to give them the privilege of onerous indorsees.

Lord *Justice Clerk*.—The pursuers must declare fully and openly, in what character it was that they received the bills, whether it was for value, or as factors for the drawers. If

* There is no printed copy of this petition in the collection of Session papers belonging to the society.

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value was given by the pursuers on the faith of these bills even in the character of factors, they are to be considered as onerous indorsers, and as such not liable to any extrinsic objection that might have been good against the drawers; at least not to any objection not founded on the constitution of the debt, for where the objection applies to the constitution, there is a great difference betwixt the situation of a factor and of any other person; a factor must be presumed to have known in what way the debt was constituted, and consequently to have known the nature of the objection. The pursuers must specify in what manner the bills came into their hands.

“ The Lords having heard this petition they remit to the
 “ Lord Ordinary to call and hear parties procurators thereon,
 “ and to do therein, and in the whole cause as he shall see just.”
 And the Lord Ordinary having called the cause and heard parties his Lordship “ Ordained the pursuers to give in a condescendence, stating whether or not they are onerous indorsees to the bills in question, at what time they became so,
 “ and if they understood they ran the hazard of the bills in case the accepters had failed.”

Judgement.
Feb. 18. 1790.

Feb. 26.

The pursuers in obedience to this order lodged a condescendence stating,

1. The pursuers are not indorsees, the bills are drawn payable to them and they are onerous holders of these bills, they had no concern in the transactions betwixt the drawers and accepters, nor had they any knowledge of these transactions.

2. They never understood that they ran the hazard of the bills in case the accepters had failed, on the contrary, they considered themselves as having recourse against Agnew and Shephard.

ANSWERED for the defenders, that the pursuers have condescended upon no transaction which could render them onerous holders of the bills. They have not specified the time at which they became holders under any character, nor have they mentioned what steps have been taken to preserve their recourse against Agnew and Shephard.

REPLIED with regard to the value given by the pursuers, no mention was made of it in the interlocutor, nor are the pursuers bound to give an account of it. The fact, however, is, that although the pursuers have no connection with the business carried on in Guernsey, they and the drawers of the bill have many dealings in trade with each other; and in the course of these dealings, the drawers became debtors to the pursuers in a much greater amount than the bills in question; and these bills were remitted to them *pro tanto* of the debt.

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The Lord Ordinary ordered the condescendence, &c. to be printed, in order that his Lordship might take the cause to report.

Present, The Lord President, Lord Justice Clerk, Lord Eskgrove, Lord Swinton, Lord Monboddo, Lord Stonefield, Lord Ankerville, Lord Henderland, Lord Abercrombie.

Opinions.
Feb. 20, 1783.

Lord President.—His Lordship said, he was of opinion that the pursuers are onerous holders of the bills. The question is, whether they be liable to any exception competent against the foreign merchants, and I think they are not liable. It is not necessary that they should have been onerous holders from the first, it is sufficient that they have become onerous holders; and as the balance due to them greatly exceeds the amount of the bills, any exception founded on their having arisen from a smuggling transaction is not competent.

Lord Eskgrove.—I never was of a different opinion upon the point of law: But I was afraid there had been some design to cover the pursuer's knowledge of the transaction; and some of the letters seemed to show, that they were acquainted from the first with the nature of the transaction which had given rise to the bills. They were sent, not in payment of a balance due to the pursuers, but to be transmitted by them to one of the partners concerned in settling with the smugglers. It was this that affected me.

Lord President.—But when the pursuers came to hold the bills, they were entitled to retain them as a lien for what they had advanced.

Lord Abercrombie.—When I read the papers in this cause, I was affected by the letters taken notice of by Lord Eskgrove. But I am convinced, on the principles which have been explained by your Lordships, that the pursuers are onerous holders of the bills to the extent of the balance in their hands.

Judgement.

The Court decided unanimously in favour of the pursuers, with expences.

For the Pursuers, John Connel,	} Advocates.	Ja. Graham, C. S.	} Agents.
Defenders, Robert Corbet,		Alex. Wight, C. S.	
Lord Ankerville Ordinary.		Menzies Clerk.	

VOL. I. No 16.

VI. JAMES

VI. JAMES RUSSEL Shipmaster Saltcoats, Pursuer ;

AGAINST

JAMES FAIRIE Merchant in Irvine, Defender.

The marking of a payment on a bill, or an acknowledgment of the existence of the debt, during the currency of the six years, does not save against the sexennial prescription. But after the expiry of the six years, a marking in the handwriting of the debtor, or a letter by him acknowledging the debt, will keep it in force.

FAIRIE granted a bill to Mary Ruffel for L. 92, which afterwards was indorsed to James Ruffel. This bill was dated 8th May 1782, and made payable one year after date. So that the six years from the term of payment of the bill expired on the 9th of March 1789. Several partial payments were made to account of it before the expiry of the six years, both while it remained with the original holder, and afterwards when it came into the hands of Ruffel the indorsee. Some of these payments were marked by Fairie the acceptor, the last of them on the 16th February 1786 : and the last payment made to account of the bill, was marked with another hand, of date the 8th September 1788. In March 1788, Fairie wrote to the pursuer in these terms : " I wish you would send me a copy " of the bill, and the payments made on the back thereof ; " and the different dates, so as to settle balance." And on the 22d of July, four months after the expiry of the six years, Fairie wrote another letter to the pursuer, in which, after talking of other matters to be settled betwixt them, he adds : " Be " so good as send me a copy of the bill with the partial payments " thereon, so soon as you send me the above, I will fix a day " for settlement soon after." It was admitted that these expressions referred to the bill in question.

An action was brought by Ruffel for payment of the balance of the bill after deducting the partial payments. The defence pleaded was the sexennial prescription. And two questions arose, 1st, Whether the partial payments made within the six years were to be considered as interruptions of the prescription ? 2^{dly}, Whether the letters, the one dated before, the other after the expiry of the six years, were of such a nature as to interrupt the prescription ?

This action having been removed by advocacy from the sheriff-court of Ayr. Lord Eskgrove, before whom it came, sustained

C A S E
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May 7. 1791.

C A S E

II.



tained the defence of prescription, “in respect it has be ende-
 “ cided by this Court, that receipts for partial payments with-
 “ in the six years do not bar the sexennial prescription of bills,
 “ when pleaded against an action brought on a bill after the
 “ lapse of the six years. And also in respect the missive letter
 “ founded solely on the bill libelled, do not in terms of the
 “ statute prove the debt as libelled, and that the same is rest-
 “ ing owing.” The question was then brought under review
 “ of the Court.”

Argument for
the pursuers.

None of the short prescriptions have been understood to strike at the actual existence of the debt: their operation is confined merely to the mode of proof. These prescriptions have been introduced in those cases only, where the vouchers, from the nature of the debt, are apt to be neglected. And in all such cases, the claims, after the expiry of the limitation, must be established *scripto vel juramento*.

From the case of Buchan of Lethem against the creditors of Robertson, decided 31st January 1787, compared with that of Scott against Greig, 3d February 1784, the Court appear to have laid it down, that in the case of bills, the writing which instructs the claim must be posterior to the limitation. In the former of these cases a holograph letter given at the time when the bill was granted, was found not sufficient to support the bill, nor to instruct the debt *aliunde* as a holograph writing; and in the latter case a marking of a partial payment on the back of a bill, by the heir of the debtor, after the lapse of the six years, was considered as an acknowledgement *scripto* that the debt was still due. The judgement of the Lord Ordinary alludes to decisions, finding that markings within the six years do not save a bill from prescription; but the pursuer cannot discover the case which his Lordship had in view. It does not however seem very obvious why the entry of partial payments in the hand-writing of the defender should not prolong the limitation. They at least afford evidence that the bill was not duly honoured when it became due; that it remained for some time as the voucher of a subsisting debt yielding interest, and therefore these markings seem to require six years taciturnity from their date, to extinguish the influence which they must have in proving that the bill was not abandoned. It is certain at least that a written document within the period of the limitation saves from the triennial and quinquennial prescription.

In the courts of Westminster-hall, markings of partial payments within the six years save from the limitation. See in Douglas's reports p. 652. Edit. 86. the case of Whitecomb

comb against Whiting*, and it is of great importance in a commercial state, where so intimate an intercourse subsists as between the different parts of Great Britain, that the law with regard to bills of exchange should be the same.

It was undoubtedly the intention of the legislature in passing the act of the 12th of his Majesty, and rendering it perpetual by that of the 23d, to make the law on this point in the two kingdoms uniform, and the Court have seconded this view, by adopting, in imitation of the law of England, the general doctrine, that bills of exchange retain their privileges so long as they are actionable. Previous to the act 1772, bills were not transferable by indorsement, nor did they secure an onerous indorsee from the exceptions competent against the previous creditor, where decree of registration had been interposed after protest. But it was otherwise in England; and the short prescription was no sooner introduced here, than the Court sustained their privileges so long as they were actionable.

In reconsidering this point, it will be observed, that so late as September 1788, the bill in question was held by a marking on the back of it to be a subsisting voucher of debt; and it is not easy to conceive, that a bill, recognized as a good debt then, should in the May following, without any idea of payment being entertained, or any change of circumstances having happened, be considered as a piece of waste paper.

The circumstance of partial payments having been made within the six years, supports, instead of cutting down, the plea of prescription, which the defender is maintaining. The

Argument of
the defender.

• WHITECOMB

AGAINST

WHITING,

In this case the plaintive produced a joint and several note, executed by the defendant and three others, and having proved payment by one of the others, of interest on the note, and part of the principal, within the six years; and the judge thinking that was sufficient to take the case out of the statute, a verdict was found for the plaintive.

A new trial was applied for; the application proceeded solely on the effect which was to be given to this acknowledgement of one of the accepters in a question with the other.

Lord Mansfield---The question here is only, Whether the action is barred by the statute of limitations? Payment by one is payment by all, the one acting virtually as agent for the rest, and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due.

Willis Justice. The defendant has had the advantage of the partial payment, and therefore must be bound by it.

Ashurst and Buller of the same opinion.

A new trial was refused.

long

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VI.

long negative prescription does not require *bona fides* on the part of the debtor, and after the years of prescription are run, it is not competent to prove the existence of the debt even by his oath. The foundation of that prescription is not a presumption that the debt is paid, but that it is relinquished; consequently that presumption cannot take place where the creditor has been demanding and receiving a partial payment. A new course of prescription must run from the date of every such payment.

But the presumption of all our shorter prescriptions is, that the debt has been paid; and that presumption is strengthened by evidence that part has actually been paid. Erskine, B. III. tit. 7. § 39.

This being the nature of our prescriptions prior to the 12th of his Majesty, the framers of that act would certainly pay attention to it, and regulate the short prescriptions they were to introduce by the same principle: or had they intended to deviate from the principle of all our other short prescriptions, they would have explained themselves in unambiguous language. Now the act provides, that no bill or promissory note shall produce diligence or action after six years from the term of payment: “ But that it shall and may be lawful and competent at any time after the expiry of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory notes, and that the same are resting owing, by the oath or writ of the debtor.” In the whole act there is no expression of any intention that this prescription should be regulated by principles different from those by which the other short prescriptions are regulated; all of which were introduced by statute: here, as in the other cases, the debt after the six years, may be proved by the oath of the debtor.

It is admitted by the pursuer, that in some cases payment within the six years does not preserve a bill from falling under the statutory prescription. Indeed Scott against Gray 3. Feb. 1784, is decisive on this point, as it shows that the bench were unanimously of opinion, that payments within the six years did not interrupt the prescription.

Since that time not a doubt has been entertained on the subject till now, that the court has been called on to alter their opinions, on the footing that parliament, by the act 1772, meant to put bills in Scotland on the same footing as they were in England. Where it is said that a partial payment within the six years preserves a bill from prescribing, and that a new course of prescription must commence from the date of that partial payment.

It may be desirable that the law of the countries should be the same, but there is no reason why the law of this country should

should give way to the practice of England. The prescriptions introduced by the statute of limitations are essentially different from the shorter prescriptions in this country.

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VI.

By the statute of limitations in England, all personal actions must be brought within six years of the cause of action, otherwise the defendant may plead the statute of limitation in bar of action; nor is he bound to say that the debt is paid. There can be no reference to his oath, that is a mode of proof unknown in the courts of common law in England.

21st James I. c.
19.

Here is a most important distinction, to which it will not be pretended that the statute 1772 was meant to apply. Both the debt and voucher of it is annihilated by the statute of limitations with us, though the voucher cannot produce diligence, &c. the debt may be raised up by the oath of the debtor. A practice unknown in our sister kingdom.

The injustice of the statute of limitations is so great, that the judges in England, anxious to take the cases out of the statute, will admit a promise of payment within the six years to constitute the claim.

Further, all the shorter prescriptions of the law of England stand on the same footing; nor can any thing be more different from our shorter prescription. Thus the executor of a debtor having inserted an advertisement, informing the creditors of the deceased, that they would be paid their debts on applying to him, a claim for a prescribed note was sustained on this general advertisement. The collector observes, that although a general advertisement of this kind might be understood to apply to legal subsisting debts only, yet it will be held to amount to such an acknowledgement of debts, that are barred by the statute, as to make them revive; so when a debtor in his will directs that all his debts shall be paid, this has the effect of reviving a debt and bringing it out of the statute.

Precedents in
Chancery,
p. 385.

Such is the law of England on the subject of limitations; and shall any part of our law be given up to introduce a system fraught with such ridiculous consequences?

Upon the whole, the defender maintains that the partial payments within the six years do not preserve the bill from prescribing; the law of England can have no weight, because there is no analogy betwixt the limitations of the English law and the short prescriptions of this country.

Lord Justice Clerk—His Lordship stated the circumstances of the case and observed, that a payment however small, after the expiry of the six years, takes off the presumption of payment; and it then lies on the debtor to prove, by proper vouchers, that the remainder of the debt has been paid. Now the letter in this case appears to me, to import that something

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was due. Fairie there says, he took a note of the payments which had been made, and as he might have had recourse to that note, had it appeared from it that the whole was paid, he ought to have said so; but he does not: and the natural presumption is, that there was a balance due. What that balance is it is incumbent on him to prove.

Lord *Eskgrove* said, that if the letter had appeared to him to import that a debt was due, he should have been of the opinion which had been given by the Lord Justice Clerk: but all that the debtor does, is only to desire a note of the payment to be sent, which does not imply either that the debt was paid, or that it was not paid.

Lord *President*.—His Lordship observed, that it was of the greatest consequence for the country to have a fixed rule in such a case as the present. He said he was by no means satisfied with the argument which would allow no effect to be given to the marking of the payment within the six years. In considering this matter, his Lordship said, that he would first take the case where interest was marked on the bill. Supposing that there should be a regular marking of the payment of interest during the six years, yet by the lapse of that period the bill is said to expire in terms of the act of parliament; and it is maintained, that in order to save the bill from prescription, the payments must have been marked after the expiry of the years of prescription. But in opposition to this way of arguing, let me ask whether the payment of interest on the sixth year does not prove the existence of the debt at that time: Then, does the short prescription of one year, or of one month, or of one day, put an end to the bill? there is nothing more common than to trust to such a marking in transactions with the banking houses of this country. The promissory note of a banker is carried to his counting house, and interest is regularly marked; but it never happened that by the lapse of the six years the banker thought himself discharged of his debt: indeed how should he? Is not the payment of interest a proof by writing, a month perhaps before the expiry of the six years, that the debt was at that time actually due. It could not then be the meaning of the legislature to cut off a bill in this situation. There has been thrown into this act of parliament a power of proving the debt by the writ, or by the oath of the debtor, which was in fact done by the law of Scotland without any such enactment; but it has been worded in such a manner that the proof refers to a period after the expiry of the six years. This brings me to the case before the court, which is not a payment of interest, but a payment to account of the debt; there may no doubt be payments both within the six years and beyond that period, which do
not

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not prove the existence of the debt; the creditor may, for example, get possession of effects belonging to the debtor; but what is the case here? the payments have been regularly entered on the back of the bill, and still a balance is due, which has been acknowledged by the letters founded on by the pursuer. Prescription, therefore, cannot have taken place. But there is still one thing to be fixed; supposing the sexennial prescription to be interrupted by an acknowledgement of payment, how long would this interruption preserve the debt? An acknowledgement does not alter the nature of the debt; it is still a bill debt, and ought therefore to continue for six years longer, in the same way that the court (in the case of a cautioner who had renewed his obligation by a letter during the currency of the seven years) found that the new obligation remained in force for seven years from its date.

Lord *Eskgrove*—His Lordship on reconsidering the letter, thought that it did import that a debt was due to some extent; his Lordship therefore altered his opinion on that head. With regard to the opinion delivered by the Lord President on the act 1772, his Lordship said, that he had no knowledge of its history, and he could judge of it only from the words of the act; from these he conceived it to differ from the acts by which the triennial prescription was established. These acts made a limitation of the mode of proof where the debt was not constituted by writing. In these cases proof of resting and owing is cut off, unless by oath or writ. Where writing intervenes, the debtor must by common law prove payment. Previous to the act 1772, in the case of bills, it was competent to prove their existence, and to rear them up even after twenty years. This was a heavy grievance, bills were not meant as permanent securities, and therefore they were by this act limited to a certain endurance. The act in so many words says, that after the expiry of six years, no action or diligence shall proceed on bills; leaving the existence of the debt to be proved by the writ or oath of the debtor. The sense therefore which I put on the act is, if no action is brought within the six years (which action by the by when it is brought must endure for forty years), it is to be presumed that the debt is paid. Now what have we in this case? so many receipts of payments within the six years. I shall admit, that a receipt acknowledging the payment of interest after the expiry of the six years, is perfectly inconsistent with the idea of the debts having been paid; but a receipt for a payment during the years of prescription surely does not exclude the debtor from the benefit of the enactment, nor tend in the slightest degree to prove that the debt is due after the six years. If payment interrupt prescription, it must make the debt endure for forty years; for had it only the effect of saving the prescription, the act would

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have said so. The oath or writ of the debtor proves the existence of the debt.

Lord *Justice Clerk* thought this question of importance: It is material to have the point fixed, though it does not seem to be of much importance, nor would it argue injustice in the legislature in whatever way the point was fixed. His Lordship did not think there was much room for argument, he did not go into the law of England, because he did not profess to understand it. This question depends entirely upon the statute, and to that his Lordship had given particular attention. The act says, that no diligence being raised on a bill within the six years, none can be raised after that period on that ground of debt: But the legislature, for the benefit of the creditor, has allowed the debt to be proved by the writ or oath of the debtor; now, whether must the writ be before or after the currency of the six years? If during the currency of the six years there be a renovation of the debt, then that stands on a different footing; but if there be no renovation, what kind of writing can it be that is to establish the existence of the debt at a period posterior to its own date? It is clear, that during the currency of the years of prescription, there can be none; it must therefore be a writing of a date posterior to the lapse of the six years; for it is not in the nature of things possible, that any writ during the currency can prove that the debt is to be in existence after that period shall have elapsed. Marking, or payments therefore within the six years, are no interruption of the prescription, after the lapse of the six years they are.

Lord *President*—The opinions on this subject, though not necessary for deciding this cause, ought to be understood: suppose this to be the last day of the six years, that I yesterday received thirty shillings as the interest on my thirty pound bill, and that the payment was marked on the back of the bill, and so proved that every halfpenny of the debt was then due, to-morrow, the day after the lapse of the six years, I demand the debt, says my debtor, “you have come a day too late, “the debt was no doubt a good debt yesterday, but it is now “lost by the expiry of a day.” I would answer to him, “no “sir, this receipt shows, that of that date the whole debt “was due, and unless by the expiry of one day prescription “can take place, it must still be due, even by the words of “the act of parliament.” His Lordship likewise observed, that the effect of an acknowledgement must be to keep the bill alive, as a bill; that is, for six years longer; and his Lordship urged this, on the analogy of the case of the cautioner (which he had stated in the former part of the debate), and which case in his Lordship’s opinion was a much nicer one than the present.

Lord

Lord Justice Clerk—His Lordship was of opinion, that the case of a cautioner could not affect the decision of this question; for so far had the court been from supporting a renewal of cautionry obligations within the seven years, that they had found it to be out of the power of a cautioner, during the currency of the seven years, to bind himself to prolong the term of his engagement.

The *Lord President* said, that he did not recollect of ever having met with any such decision in the printed cases.

Lord Justice Clerk—His Lordship further observed, that the *Lord President* had put a case, which no doubt seemed to make the argument, which his Lordship was combating, a very absurd one. And to prove that the expiry of a single day might have the effect of cutting off a bill. But his Lordship, after recapitulating the circumstances of the case stated by the *Lord President*, said, that the bill, according to his conception of the law, could be reared up only by the oath or writing of the banker.

Lord Eskgrove—His Lordship said, he had learned from what had past, that it was necessary in practice to make the debtor mark every payment on the back of the bill.

Lord Justice Clerk said any marking is good as to the payments within the six years; a marking in the hand-writing of the debtor is necessary only when the payment is made after the expiry of the years of prescription, and where the marking is capable of saving against the prescription. In such a case the hand-writing of the debtor is required for a very good reason, because, were a marking in the hand-writing of the creditor to be sustained, it would be in his power to exhibit it at any time, and to rear up a bill which had fallen by prescription.

“ The Lords having advised this petition, with the answers thereto, they find that the letter in process, dated Judgment.
“ 22d July 1787, from the defender to the pursuer, after the
“ lapse of the sexennial prescription, does instruct, that the
“ debt libelled was then resting and owing in part; therefore
“ repel the defence founded on the sexennial prescription,
“ and remit the process to the *Lord Eskgrove Ordinary*, with
“ power to his Lordship to call the cause, hear parties procurators,
“ and to proceed further therein, as to him may
“ seem just.

For Pursuer, A. Abercrombie, } Advocates. Alex. Wight, C. S. } Agents.
Defender, Ed. Armstrong, } Geo. Tod, }

Lord Eskgrove, Ordinary. Menzies Clerk.

Vol. IX. No. 8.

I. The

I. The PRINCIPAL and PROFESSORS of the College of Glasgow;

AGAINST

DUNBAR, Earl of Selkirk, and others.

I. A cautionry obligation that a factor shall account for the rents of a subject to which the constituent has a right by a certain lease, does not bind the cautioner for the rents of the subject collected after the expiry of the lease.

CASE

I.

One great source of the revenue of the college of Glasgow arises from the rents of the Archbishoprick of Glasgow, which are held under leases from the crown that have regularly been renewed since the Revolution. In the nomination of a factor in the 1745, the college gave him a right to uplift the whole rents and duties of the university; and, in particular, the revenue of the archbishoprick is specified, and the enumeration closes with these general words:—"And generally all and
 "fundry the fruits and rents belonging to the said archbishop-
 "rick which the said university has been in use to receive,
 "and have right to receive, by virtue of the above-set tack
 "granted to their predecessors, &c. by his Majesty, &c. con-
 "form to a rental, and that for crop 1745, and in time co-
 "ming thereafter, ay and until these presents be recalled." On the other hand, the factor, as principal, and with and for him the Right Hon. Dunbar Earl of Selkirk, William Miller writer to the signet, and Alexander Stirling merchant in Glasgow, as cautioners, &c. bound and obliged them, jointly and severally, their heirs, &c. that the said factor should count, reckon, and make payment, &c. of his whole intromissions, &c. in virtue of the foresaid factory.

The tack which was referred to, and under which the factor was to receive the revenue of the archbishoprick, was granted by the Barons of the Exchequer; it commenced in the 1736, and expired in the 1755. The factor, however, without any new warrant, and without a new bond of cautionry, continued in his office down to the 1783; and at this time it appeared, from the accounts of his intromissions, that in the various branches of the revenue of the college, (this of the archbishoprick excepted) the balance was in favour of the factor: On that branch, however, there was due by him a balance of L. 3942.

In these circumstances the question was, Whether the cautioners were liable for the rents of the archbishoprick after the expiry

expiry of the lease that terminated in the 1755? And there was eventually another question, Whether the heirs of two of the cautioners who had died were liable for the intromissions of the factor after the death of their predecessors?

CASE

I.

Before entering upon the general argument, the pursuers endeavoured to show, from the circumstances of the case, and the stile of the factory, that in mentioning the tack from the crown, there was no intention of limiting the factory, but only of enlarging the powers of the factor; and that the obligation on the cautioners was meant to be equally broad as that on the factor. The pursuers then take up the general question on the following ground.

Argument for
the Pursuers on
the 1st point.

It has been said by the defenders, that cautionry is a mere *literarum obligatio*; and this is founded on the argument in the case of Colt, as collected by Lord Kaimes.

This the pursuers dispute. The ultimate ground of the obligation on a cautioner is his consent to become bound, and there is nothing to prevent this from being expressed in the same way with other obligations. Writing is the best means of preserving the terms of an obligation, and affords the easiest way of rendering it effectual; it is therefore the most commonly used: but a cautionry obligation may be undertaken verbally; and had the cautioners in this case met with those who acted for the university, and engaged that they would be sureties for the factor, such an obligation proved by the oath of the cautioners would have been effectual.

Transactions respecting land require to be committed to writing, and without a regular deed there is *locus penitentiae*; but the pursuers know of no law, nor lawyer, who says, that cautionry obligations are in the same situation.

It is true, that where parties agree to reduce an obligation into writing, it is not complete until the writing be executed; but this is not peculiar to cautionry obligations, it is common to all cases whether *stricti juris* or *bonae fidei*.

The pursuers are no less mistaken in their conclusion than in their premises, when they maintain, that a cautionry obligation is to be taken according to the strict letter, without any regard to the intention of the parties. There is, no doubt, a latitude to be given in the interpretation of deeds; but obligations of every kind (whatever may be the case with entails) are not to be interpreted in the judaical manner contended for by the defenders.

Even in transactions respecting land where writing is required, the great object is to give effect to the views of parties; and the Court has, for obtaining this, gone much beyond what the pursuers contend for. Hence it has been found, that a sale of lands included the teinds also, when it appeared,
from

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from circumstances, that it had been the intention of the parties to include them. Dict. *voce* Teinds. Stair, 27th February 1672. Scott v. Muirhead. Fountainhall, 29th June 1698, Callander v. Carruthers. Kilkerran, Dunning, v. the Creditors of Tullieball, July 5, 1748, are strong cases: For 1st, Writing was necessary, not as evidence only, but as a solemnity; so that there, if in any case, the Court ought not to have gone beyond the writing. 2d, Teinds are held in law to be a separate estate from land; and yet, because it appeared to have been clearly the intention of the parties to convey the teinds, the Court found that they must go with the lands. The same rule ought, therefore, to hold where writing is used merely as evidence of the transaction, and in cautionry obligations as well as in others.

The defenders pointed at a distinction betwixt cautionry obligations and mutual *bona fidei* contracts, where a *quid pro quo* is given; but the pursuers see no ground for this distinction. It may be true, that the cautioner puts no money into his pocket in consequence of the obligation: but he obtains his object, he gets credit or cash, or as in this case a lucrative office for his friend; and when the case is considered on the part of the creditor, it is evident that the cautioner must lie under the strongest obligation to make good his engagement. It is upon his faith the creditor relies: if he had not interposed the transaction would not have taken place. There is, therefore, no justice in allowing the cautioner to get free whilst the principal is bound.

On this point it cannot be said, that the pursuers are insisting for an extensive construction. In support of their plea, not a word is necessary to be supplied or omitted: they are endeavouring to obtain implement according to the spirit and letter of their obligation, while the defenders are attempting to put a forced construction on the terms of the agreement.

The pursuers then take notice of the following cases founded on by the defenders. Having stated the case of Colt against Angus from Lord Kilkerran, and the argument in the same cause from Lord Kaimes, they observed that the argument in that case did not proceed on any thing peculiar to cautionry obligations, nor did it appear to be a question of construction, but to depend entirely on this, whether the omission in the obligatory clause was sufficient to annul the deed? That besides, it appeared from Lord Kilkerran, (*voce* writ, No 16.) that there had been two judgements the other way; and when they sustained the defence, it was only by a narrow plurality, and that the minority disapproved much of the judgement, as appeared from the reasons of their dissent annexed to the case.

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The case of Campbell against Hamilton has not been collected; but it appears not to be a case of construction, nor to depend upon principles peculiar to cautionry obligations.

CASE

II.

The pursuers next referred to the case of the heritors of Coupar against Paterson and Bell, Fac. Col. 18. Nov. 1788, as totally adverse to the plea of the defenders, viz. that a cautionry engagement is to be held as a *literarum obligatio*; because there, although the obligation had been regularly given up by the creditor, and destroyed, the court found the cautioners liable.

Many cases show that cautionry obligations are not to be interpreted so judaically as the defenders contend for: Thus Forbes, 23d January 1711, Creditors of Park Hay against Falconer, it was found, that a factor being liable in annualrent, the cautioner must likewise be liable for annualrent. A case to the same purpose is collected in Fountainhall, June 18th 1706, Hamilton and his assignees against Calder of Muirton. In this case the contract received a *bona fide* construction, Kilkerran, Scott against Carnegie, December 6th 1749. Kilkerran, (*voce falsa demonstratio*) Hamilton and Baird against Hunter, 5th July 1743.—8th July 1758, Grant against Forbes.

As the pursuer's right to the revenue of the archbishoprick arose solely from the lease which was to expire in the 1755, and as the factory referred particularly to that lease, and enabled the factor only to uplift the rents payable in virtue thereof, it follows that the factor had no authority under the factory to uplift any of the rents falling due after the 1755; and as the cautioners were liable only for the factor's intromissions under that factory, they cannot be liable for his intromissions with the rents of the archbishoprick after the 1755.

Argument for
the defender.

The pursuers have contended, that in every contract the meaning of the parties must be the rule of the interpretation; and when that meaning can be discovered, it ought to be followed out. But though this rule may be very proper in the interpretation of deeds of settlement where the will of the testator (when it can be discovered) ought to be followed; and although it may be adopted in explaining mutual *bona fide* contracts, where there is a *quid pro quo*, yet in construing the extent and import of a cautionry obligation, which is *strictissimi juris*, there is no room for enquiring as to the intention of the parties, nor for inferring a more extensive obligation on the cautioner than the words do themselves import. It is a mere *literarum obligatio*, originating in the written instrument, and must be confined by the words there made use of. This may be illustrated by several decisions; thus Colt against Angus, 2d June 1749, as collected by Lord Kaimes. It is also illustrated by his Lordship's Principles of Equity, p. 42.

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Further,

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Further, by a case uncollected, 3d March 1786, Campbell against Montgomery. Montgomery was taken upon a *meditatio fuga* warrant, and Mr. Hamilton became bound that he should sist himself in the action *presently depending* against him at the instance of Campbell. The cautioner being required to produce Montgomery, he insisted that he could not be bound to produce him, as at the date of the obligation there was no action in dependence, the summons not having been executed against him at that time; and accordingly the Lords refused to grant diligence, “in respect the obligation bears date prior to the
“date of the execution of the summons in the present ac-
“tion; and to this the Court adhered, though it was evidently the intention of the cautioner to sist Mr. Montgomery at the diets of Court in that very action, which shows the strict adherence to the opinion that a cautionry obligation is a mere *literarum obligatio*.

The pursuers mention that cautionry may be undertaken verbally. But that does not affect the defenders plea; besides, it will be difficult to produce an instance of such an obligation resting on a verbal promise, previous consent must be supposed, as without that the written instrument could not be prepared; and the defenders may rest their answer to this plea on the case of Colt against Angus.

But it is not on a promise that the pursuers have brought their action, it proceeds on the written instrument, and this deed must regulate the extent of the engagement. It is a mere *literarum obligatio*, and it cannot be denied that cautionry obligations, for which the cautioners receive no consideration, are *strictissimi juris*, and consequently cannot be extended beyond the words in which the instrument is expressed. In the case of Colt against Angus, and Campbell against Hamilton, the Court would not listen to the plea of intention; but considered the written instrument to be the only measure of the cautionry obligation; and in the present case, from the words of the factory, the defenders are entitled to maintain that they are not liable for the factor's intromissions with the rents of the archbishoprick subsequent to the 1755.

The pursuers have said, that in cases when writing is required as a solemnity, the great object is to give effect to the intention of the parties, and they instance the case where the teinds went with the lands; because such had been the understanding of the parties. And they add, if this be the rule in cases where writing is required as a solemnity, much more must it be so when writing is required only as evidence of the meaning of the parties.

To this an answer has been given. In deeds of settlement the will of the testator ought to govern; but even there the intention is laid aside, if the words are in any degree inconsistent

sistent with it. It is also just to interpret literally all *bona fide* contracts, such as sales, when an adequate consideration is given by the purchaser, otherwise one party would gain an evident advantage. But in cautionry obligations, the sole benefit whereof is to be reapt by the principal, whilst the cautioner subjects himself to the risk of loss without any prospect of advantage, the most strict and rigid interpretation ought to be adopted.

The pursuers appealed to the decision in the case of the heritors of Couper against Bell; but the decision there did not turn on the import of the question. But on this point, whether the cautioners could be liable after the church had been taken off the builder's hand as sufficient, and the bond of cautionry given up.

Several other decisions have been appealed to, but none of them seem to be material to this question. In the case of Hay of Park against Falconer the cautioner was made liable for the interest. But this decision, if not founded on the words of the obligation, (which does not appear) must have proceeded in consequence of the obligation to pay interest imposed by the act of sederunt 31 July 1690. In the next case, Sir Geo. Hamilton against Calder, it seems to have been decided upon a specialty; for Calder was joint tacksmen along with Sir James Hamilton, and he had not required Hamilton to count with Murray during his lifetime. The case of Scot against Carnegie is equally immaterial: the question was not as to the extent of the engagement, but for whom it was interposed; neither will the only other case the pursuers has resorted to avail them, that is, the case Gordon against Forbes, 8th July 1758. That decision was not given on the presumed intention of the parties, but from the necessity of guarding the public against the ravages of an officer to whom great powers are necessarily given.

The Court on advising this cause delivered the following opinions:

Lord Justice Clerk.—A cautionry obligation is never extended beyond the fair and obvious interpretation of the deed by which it is constituted. In this case, the factory is special as to the subjects; it contains a special enumeration of what the factor was entitled to uplift, under a lease of a certain date and duration. The cautioners are not therefore liable for the intromissions under the new lease, for that was in fact a new estate; and they never can be made liable for intromissions with an estate not enumerated in the cautionry obligation. A person engages more readily as cautioner for a factor's intromissions with a subject, the extent of which he is acquainted with, than where the intromission is indefinite, and may be extended

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extended to subjects, of which he has no means of knowing the extent. His Lordship was for restricting the obligation to the rents drawn under the original lease.

Lord *Eskgrove*.—Had the cautionry obligation been for all intromissions with the rents which belong or shall belong to the university, this no doubt would have made the cautioners liable for the intromissions under the second tack; but there is no such obligation. The factory comprehended no more than the rents leviable under the first tack; cautionry engagements are *strictissimi juris*; and since a cautioner cannot gain any thing by the transaction, the rule is strictly equitable.

Lord *President*.—His Lordship said, that he hesitated at first to go into the opinions which had been delivered, and chiefly from this circumstance, that these leases obtained by the college were invariably renewed at the end of every nineteen years; and that the contract bears, “all rents belonging to the said archbishoprick which the said university has been in use to receive.” This, however, may be regarded as a kind of description of the species of right which the college held, and therefore the opinion already given appears to me to be a sound one, and perfectly consistent with the true nature of cautionry obligations. The cautioners are entitled to say, we became bound as cautioners to the university for their factor’s intromissions, under a tack of nineteen years endurance, (which is the term expressly mentioned in the factory) and to no further extent can you subject us.

Judgement.

“The Court sustains the defence pleaded for the defenders; they can only be liable for the intromissions of the factor with the rents &c. of the archbishoprick of Glasgow, during the period of the lease thereof mentioned in the factory contract libelled, and which expired at Whitsunday 1755, but for none of the intromissions had by him under any subsequent leases of that archbishoprick that may have been procured by the pursuers.”

A petition against this judgment was refused without answers.

II. When a cautioner binds himself and his heirs for the intromissions of a factor, his heirs continue bound after his death until they shall have intimated their resolution to withdraw from the obligation.

Argument for
the Pursuer.

The defence is, that the representatives of Messrs. Miller and Stirling are not liable for deficiencies incurred after the death of the original cautioner. The cautioners bound themselves, their heirs and representatives, for the factor’s intromissions. The pursuers know no ground in law, nor any thing in the terms of the contract, nor circumstances of the case, to warrant a restriction of the obligation on the heirs to those intromissions

sions only, which took place during the life of the original cautioner, neither do they believe that there is any practice that can give countenance to such a construction.

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In the case of cautioners for messengers, the heirs and successors of cautioners are taken bound, and they are understood to continue during the life of the messenger. The plea may have been suggested by the practice of banking houses, who, on the death of a cautioner, invariably require a new one; but this practice is rendered necessary by the situation of a banker, who must always have the full command of his funds, which he could not have, were he under the necessity of pursuing the heir of a former cautioner.

The obligation of cautionry must be undertaken voluntarily, and cannot be imposed on any man without his consent. Although therefore Messrs. Miller and Stirling might have effectually bound themselves as cautioners while they lived, they had no power to continue that obligation after their deaths, and to make their heirs and successors continue cautioners during the subsistence of the factory. A man who is cautioner for borrowed money does of necessity impose the same obligation on his representatives, and if no demand is made within the seven years the obligation falls. The case however is different when the obligation is, that a factor shall be responsible whose accounts are settled annually. He may bind his representatives for what falls due during his own life, but he cannot compel his representatives to take on themselves the same obligation, and to remain bound whether they will or not. To this extent, however, the plea must be carried, for otherwise the obligation cannot be at all imposed on them; for as cautionry, *ad factum prestandum*, is undertaken from a confidence in the integrity of the person, it is impossible to implant that confidence in the heirs of the cautioner.

Argument for
the defender.

But further, according to the pursuers plea, a person may be involved as a cautioner, and remain bound for years, without knowing any thing of the matter, the obligation being to him a latent deed until a demand comes upon him.

Though a man may bind his heirs to pay his debt, he cannot impose an obligation on them, by which a debt shall arise against them after his death that did not exist at any period of his life. When the cautioner of a messenger dies, the messenger is laid under the necessity of finding a new cautioner; and the same practice is followed in the different banks with respect to their officers, &c.

Lord Justice Clerk said, that the cautioner of a tenant cannot withdraw his obligation, neither can the heirs of the cautioner, because the landlord cannot withdraw on his part; but a cau-

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a cautioner for the intromissions of a factor may, on giving due intimation of his intention to the constituent, that the constituent may remove his factor, or take care of himself. In the present case, the cautioners bind themselves and their heirs for the intromissions of the factor; the obligation must therefore continue against the heirs, until they intimate their intention of withdrawing from the obligation. His Lordship observed, that the custom of taking new cautionry obligations on the death of a cautioner was merely to save the expence of constituting the debt against the heirs of the deceased cautioner.

Lord *President*—His Lordship said, that he was clearly of the opinion which had been delivered by the Lord Justice Clerk. He mentioned the cases of a cautioner for a widow's jointure, and for the repayment of a sum of money, as instances where the cautioners are bound absolutely, and as forming exceptions to the present case.

The Court declared their assent to these opinions.

Judgement on
this point.

“ The Lords repel the defence pled for the representatives
“ of Mr. Miller and Alexander Stirling, of their not being
“ liable for any intromissions of the factor subsequent to the
“ death of these two cautioners, and find the cautionry ob-
“ ligation must be equally effectual against them as against
“ the Earl of Selkirk, the other defender, and only original
“ cautioner now in life.”

For Pursuers, Ad. Rolland, J. Miller, }
Defender, Alex. Wight, } Ad.

J. Balfour C. S. }
J. Davidson C. S. } Agents.

Lord Swinton Ordinary.

Home Clerk.

C L A U S E, C O N S T R U C T I O N.

I. THOMAS CLAYTON Charger,

A G A I N S T

ROBERT GRAHAM Suspender.

A clause of redemption in favours of the heirs-male on the succession opening to heirs-female found to be no bar to a sale of the estate by the institute.

C A S E

I.

Thomas Clayton conveyed the lands of Pottershill to his son James Clayton the charger, “ and to the children, one or
“ more,

“ more, to be procreated of the marriage betwixt him and
 “ Mary Lillie his wife, and their heirs and successors; whom
 “ failing, to the children, one or more, to be lawfully procreat-
 “ ed of his body in any subsequent marriage, and their heirs
 “ and successors; all whom failing, to the granter, and his own
 “ nearest heirs and assignees whomsoever, &c.

The disposition contains this clause, “ and it is likewise
 “ hereby declared, that the said Thomas Clayton my son
 “ shall have full power and liberty to distribute and divide the
 “ said lands amongst his male children, in such proportions as
 “ he shall think reasonable, or to give the whole thereof to
 “ the eldest or any other of his sons; but in case the said Tho-
 “ mas Clayton my son shall happen to die leaving only daugh-
 “ ters, then and in that case, it is hereby expressly provided,
 “ that the lands and others before-mentioned shall be redeem-
 “ able by me or my heir-male for the time, from the daugh-
 “ ters, one or more, of the said Thomas Clayton my son, up-
 “ on our making payment to the said daughters, one or more,
 “ of the sum of L. 900 Sterling money; and the said lands
 “ shall be redeemable for the space of six years after the de-
 “ cease of Thomas Clayton my son, but thereafter shall be
 “ irredeemable, and become the absolute property of the said
 “ daughters one or more, in case he shall have no sons in life
 “ at the time of his decease.”

This clause was referred to in the procuratory of resigna-
 tion and precept of sasine; it was ordered to be ingrossed in the
 instrument to follow thereon, and has accordingly been insert-
 ed in the titles. The conveyance contained neither irritant
 nor resolutive clauses. Under this right Thomas Clayton the
 disponent sold the lands to Mr. Graham for L. 1710 Sterling.
 And as Clayton has only one daughter, and the elder brother,
 who is the heir-male of old Clayton is still alive, a doubt was
 entertained that the right of redemption might, in the event of
 the succession opening to the daughters, be still exercised; and
 therefore a suspension was presented by Mr. Graham, which
 coming before the Lord Justice Clerk, was taken to report on
 memorials.

The limitations on the charger's right of property is a right Argument for
 of reversion *in gremio* of his disposition ordained to be inserted the Suspenders.
 in all subsequent conveyances, and actually ingrossed in his in-
 struments. If then a right of reversion can be effectually con-
 stituted by law, it has been established in this case.

Reversions have been long known in this country, and de-
 rive their support, not merely from usage, but from statute.
 But it has been said by the charger, that reversions are in use
 to be adjected to wadsets only, or to sales for onerous causes.
 It does not appear, however, that this is founded on the au-
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C A S E

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theory of the statute upon the law, or from a just view of the case, *Infant v. Morgan*.

If the chargee's interest has no support from authority, it seems far less to be founded on sound principles. There can be no good reason, that a person who makes a gift should be under greater restraint as to the mode of constituting or limiting the right conveyed, than one who sells a subject for a just price. Indeed it will seem that a more liberal interpretation ought to be given to the condition than which the author of a gratuitous grant has indicated, that is those inserted in an ordinary deed. In the one case, the chargee having no claim for the right, must take it just as it is conveyed to him; but in the other an equivalent being given by the purchaser, he is entitled to demand a strict explanation of all burdens upon his right.

It has been said, that, in explaining this clause, the will of the grantor ought to be ascertained to, and that the presumption is, that the grantor meant no more than a simple destination of his lands, otherwise he would have inserted the proper, irritant, and resolutive clauses. If, however, a simple destination had been all that was intended, it cannot be supposed that he would have added to it a power to his heirs-male to redeem from the daughters of the charger. Besides, this argument takes for granted the very question in dispute; it supposes, that the clause of reversion does not restrain the charger from selling the land. That it was the grantor's intention to put it out of the charger's power to frustrate the right of reversion, appears sufficiently evident from the provision, that the burden shall be inserted in all future infeftments.

Argument for
the Charger.

The conveyance under consideration is a settlement *inter familiam*, and must be judged of by rules which are applicable to deeds of that kind, and not upon principles drawn by analogy from cases different in their nature, and in which there was a different object in view. In interpreting any doubtful clauses of a deed, it is a good rule to give it that meaning, consistent with the general nature of the deed. Thus, if the object of a deed be to convey a subject to a certain series of heirs, the law will interpret every part of that deed so as best to give effect to that intention.

Old Mr Clayton's deed is meant to regulate the succession to the estate; but it is no more than a simple destination, giving to those who are appointed to succeed only a *spes successionis*. The right is conveyed simply to the charger and his children. The deed is clogged with no clauses prohibitory, irritant, or resolutive; and the fee is fully vested in the charger, subject to his debts and deeds.

There

There is, it is true, a power of redemption, but that is only in a certain event; and although that might have been effectual against the charger's daughters, it does not follow that it must be effectual against himself; nor is there any thing inconsistent in one of the substitutes in a destination being burdened while the others are free. A proprietor may dispose of his property, subject to what conditions he thinks fit. When a man makes a simple destination in favour of certain substitutes, and to others a limited fee, the right of the former is complete over the subject, while the latter, if the succession opens to them, must receive it under the burdens of the original grant.

Had the heir-male of the granter, to whom the power of redemption was given, been nominated a substitute in the destination, it is clear that his right might have been defeated by any deed of the charger's; and it seems to follow, that the lesser eventual right is equally liable to be defeated.

Were a power of redemption, similar to that in the present case, to be held effectual against a singular successor, a method would be furnished by which an entail might be created without clauses irritant and resolutive, and without registration in the record of tailzies.

The placing land *extra commercium* has always been viewed in an unfavourable light; and although statute has given that power, when the entail is executed according to certain rules, yet such deeds have always been strictly interpreted; nor have these limitations ever been extended by implication, so that unless the deed contain an express prohibition to alienate and contract debt, the debts and deeds of the fiar are effectual.

In this case the fee of the subject is in the charger. The deed contains no prohibition, nor is there an entail on record. The power of redemption is only in one event, which supposed the charger to have died without heirs-male of his body, and the succession to have opened to his daughter: but as there is no provision for limiting the right of property in the charger, or prohibiting him from selling, he must have a power to defeat the right of redemption. To give the clause any other meaning is to infer, by implication, a restriction which has not been imposed.

The circumstance of the clause of redemption being inserted in the titles, is equally proper, whether it was intended to be effectual against all the substitutes, or against one only.

The charger has no occasion to dispute the doctrine, that rights of reversion, when properly executed, are real rights limiting property. He only contends, that when a proprietor has named a series of heirs, and conveyed an estate to them under no restraints or limitations, the circumstance of having limited the estate, in the event of the succession's opening to a

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thority of our writers upon the law, or from a just view of the case, Erskine B. II. tit. 8. §. 2.

If the chargers doctrine has no support from authority, it seems far less to be founded on sound principles. There can be no good reason, that a person who makes a gift should be under greater restraint as to the mode of constituting or limiting the right conveyed, than one who sells a subject for a just price. Indeed it would seem that a more liberal interpretation ought to be given to the qualification which the author of a gratuitous grant has introduced, than to those inserted in an onerous deed. In the one case, the disponent having no claim for the right, must take it just as it is conveyed to him; but in the other an equivalent being given by the purchaser, he is entitled to demand a strict explanation of all burdens upon his right.

It has been said, that, in explaining this clause, the will of the granter ought to be attended to, and that the presumption is, that the granter meant no more than a simple destination of his lands, otherwise he would have inserted the proper, irritant, and resolute clauses. If, however, a simple destination had been all that was intended, it cannot be supposed that he would have added to it a power to his heirs-male to redeem from the daughters of the charger. Besides, this argument takes for granted the very question in dispute; it supposes, that the clause of reversion does not restrain the charger from selling the land. That it was the granter's intention to put it out of the charger's power to frustrate the right of reversion, appears sufficiently evident from the provision, that the burden shall be inserted in all future indentments.

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remoter

C A S E

I.



remoter heir, will not change by implication the prior simple destination into a strict entail; and this applies precisely to the present case. The charger holds the lands as absolute fiar. There is no clause by which they can be redeemed from him or his assignees. The eventual power of redemption is directed against his daughters only; and it must depend entirely on the will of the charger whether they shall succeed, and consequently whether such power shall ever exist. It is clear that, by a sale in the lifetime of the charger, it must be entirely defeated.

Opinions.

It was observed, that a clause of redemption, in the event of the succession's devolving on females, was frequently to be met with in old entails. In this case the Court thought that the power of redemption was equivalent to a clause of return; that it could not have been defeated by a gratuitous deed; but can have no effect against an onerous one.

Judgement.

The Lords^{found}(suspended) the letters. *orderly proceeded*

For the Charger, Ja. Turnbull,	} Advocates.	Ja. Graham, C. S.	} Agents.
Suspender, John Connell,		J. Higgins, C.S.	
Justice Clerk Ordinary.		Home Clerk.	

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II. GENERAL GRÆME'S Trustees, Chargers.

A G A I N S T

BARON STEWART MONCRIEFF'S, Trustees, Suspenders.

A power of redeeming an estate, failing heirs male of the disponent, does not preclude the disponent from selling.

C A S E

II.



The suspenders had purchased from the chargers the lands of Gorthy, &c. at the price of L. 26,000 Sterling; but upon inspecting the titles, it appeared, that General Græme's right was burdened with a power of redemption expressed in the following terms, provided, &c. " That in case of the death
 " of the said General David Græme, without heirs male of
 " his own body, the lands, baronies, &c. are and shall be
 " redeemable by Mungo Græme, second lawful son of the
 " said deceased James Græme of Braco, or the heirs male of
 " his body, from the person succeeding to the said Colonel
 " David Græme, or the heirs male of his body, or from any
 " other of the substitutes, &c. by payment to the person so in
 " possession of the sum of L. 6 Scots money, upon any term
 " of

“ of Whitsunday or Martinmas, the said Mungo Græme or his heirs male shall think fit, &c.” The deed contains no prohibition to contract debt, to sell, or even to alter the course of succession; but it occurred to the suspenders, that their constituent, on the death of General Græme without heirs male of his body, might be exposed to a claim at the instance of the person who was now in the right of redemption; for, as they understood the General’s right to be clogged by the clause of redemption, they conceived it to be impossible for him or his trustees to convey to them any better or more substantial title to the lands than that which he himself possessed; and on this ground the matter was laid before the Court by suspension, that under their authority they might pay in safety.

The chargers said that the clause of redemption had been inserted from this circumstance: Mungo Græme, in whose favour the power of redemption was given, was the immediate younger brother of General Græme, and at the time of executing the settlement of the estate in question, it was suspected that he had died on an expedition for establishing a communication with China by the Caspian Sea, and this right of redemption was given him on the failure of the heirs to whom he would naturally have been substituted, in order to avoid the difficulty and confusion which might have attended his nomination, had his death remained uncertain; but as General Græme had an irredeemable right to the estate, as the disposition in his favour contained no prohibition to sell or to alter the course of succession, and as he was laid under no irritant or resolute clause, it was clear that his trustees possessed the entire right of disposal of the estate.

The Lords refused the bill of suspension.

It was the unanimous opinion of the Court, that General Græme was absolute proprietor of the estate; that he held it free and unlimited, and that the suspenders were in perfect safety to transact with him.

For the Chargers, Arch. Tod, C. S. } Agents.
Suspenders, H. Corrie, C. S. }

Stonefield Ordinary. Bill Chamber.

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III. JOHN CURRIE, eldest son of DAVID CURRIE of Newlaw,
and the Common Agent in the ranking of his Creditors,
Pursuers;

AGAINST

WILLIAM HANAY Esq; of Bargally, Defender.

A clause in articles of roup having appointed caution to be found for the price within a certain time, and having declared the failure to be an irritancy in favour of the next offerer, and that the person failing should incur a forfeiture of one fifth part of the price: It was found that the sale, (on the failure of the person preferred) devolved on the next highest offerer, and that an action lay for the difference betwixt the first and second offer.

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The estate of Newlaw was brought to a judicial sale, and the articles of roup contained the clauses following: The persons to be preferred were taken bound to enact themselves for payment of the prices offered, “ And for that end shall bind
“ and oblige themselves respectively to grant bond with a
“ sufficient cautioner within thirty days after the roup for the
“ several prices offered by them, and interest thereof, containing a fifth part of the price offered in name of penalty; and
“ which bonds shall be granted within the space foresaid,
“ under the penalty of a fifth part more than the prices respectively offered.”

There is another clause in these terms. “ In case the highest offerer for any of the said lots fail to find caution within the foresaid space, then the next immediate preceding offerer is to be preferred to the purchase, he always granting bond with a sufficient cautioner for payment of the price offered by him in terms above written, within thirty days after the failure of the next immediate highest offer; and in case he likewise fail to find caution within the time limited, then the other offerers to be preferred in their order, they finding caution, as said is: But prejudice to the creditors to insist against the several offerers for the surplus price offered by them respectively, more than the price offered by the offerer who shall find caution, as also for the penalty aforesaid for not finding caution, intimation being always made to the preceding offerers on the several offerers above them, their failing to find caution, and that within ten days after the purchase has devolved upon them respectively.”

The first seven lots of the estate were purchased by William Hanay Esq; at the price of L. 23,500 Sterling. The next offers appearing from the minutes of sale amounted to L. 23,210, which

which made a difference betwixt the first and second offer of L. 290.

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Mr. Hanay the highest offerer neglected to lodge his bond within the thirty days, and the common agent made intimation of the failure to the preceding offerers, requiring them to find caution for the sums offered by them respectively. They accordingly did lodge bonds of caution in terms of the articles of roup for the prices which they had offered; and Mr. Hanay having also lodged a bond of caution, alledging that he had been prevented by unforeseen accidents from lodging it within the time prescribed by the articles of roup, a question arose betwixt him and the next highest offerers, in which the Court found, that Mr. Hanay having failed to give in his bond of caution in due time, had thereby forfeited his purchase, which devolved upon the next highest offerer.

In consequence of this decision, the next offerers were preferred, and the common agent, in terms of the clauses above recited, raised an action against Mr. Hanay, concluding for the difference betwixt his and the next offer, amounting to L. 290 Sterling, and for the one fifth part of the price, of penalty, at least to the extent of the expence which had been incurred, and which amounted to L. 52 Sterling.

This action came before Lord Stonefield, and was first argued in informations, and afterwards in a petition for the defender, and answers for the pursuer.

In so far as respects the conclusion for the L. 290, this is not a penal action, but one for a debt due to the pursuers upon a mutual contract, it is an action for indemnification of loss actually sustained. The justice of the condition under which this demand is made cannot be disputed; for, besides the general practice and special consent of the defender, the articles of roup are the act of the court, and are highly expedient, in so far as they defend the creditors from an actual loss, or from an eventual one in case of a second sale.

Argument for
the Pursuers.

Every subject is worth what it will draw at a public sale, and the defender must admit that the lands were worth the sums he offered. The pursuers then are deprived of the value of the subject to the extent of L. 290 by the preference obtained by the preceding offerers, and which preference these preceding offerers were entitled to by the articles of roup, and could not be deprived of by the pursuers.

The argument which has been stated for the defender resolves into this proposition, that as he did not obtain the lands, he had a plea in equity to be relieved of the surplus price; but a court of equity will never interpose where the claimant has incurred a loss equal to what he is demanding.

Further,

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Further, the previous claim is founded upon an express contract, and that contract must receive effect unless it be illegal or incapable of execution; either of which suppositions (as it was authorised by the Court) it would be highly indecent to admit.

It was by giving effect to this contract that the preceding offerers were preferred. The defenders plea then is, that the Court should find the stipulations in question effectual to those remotely concerned, while they are declared to be ineffectual to those more immediately interested.

Argument for
the Defender.

This action is of a penal nature; and the Court will give the strictest and most judaical interpretation to the clauses of the deed upon which it is founded. By the first of these clauses it is declared, that a bond of caution shall be lodged within thirty days of the sale, under a penalty of a fifth part of the price; but no forfeiture of the purchase is mentioned; and were the action founded solely on this clause, the conclusions could go no farther than for this penalty of one-fifth of the price, without the forfeiture of the purchase. But as the defender has been deprived of his purchase, even this penalty cannot be demanded, seeing it is demandable by the clause, on the supposition that the property is with the defender. This clause then does not warrant the conclusions of this action.

By the other clause it is stipulated, that in case of the failure to find caution within the thirty days, the next immediate preceding offerer is to be preferred to the purchase. This is an implied forfeiture of the purchase; but as this is the only penalty stipulated, all that can be demanded on this clause has already taken place, for the defender has been deprived of his purchase. The remaining part contains no obligation; the words are: "But prejudice to the creditors to insist against the several offerers for the surplus prices offered by them respectively."

This is a mere reservation of a right, and that right must be the right which the pursuers had at common law; so that this claim does not depend upon contract.

But at common law the pursuers have no claim: without an actual stipulation no action could proceed for the penalty and expences, and the defender might as well be found liable for the whole price as for the surplus price. Indeed, had any such claim been in the view of parties, it would have been provided for.

Upon inquiry it turns out; that not one half of the bonds of caution are lodged within the stipulated time: within the last six years there have been fifty-five which were beyond the time, without the validity of the purchase having been called in question.

There

There seems therefore to be no ground for an action in this case: But admitting that action were to lie upon the clauses, it would be to the extent of the actual damage only; and from a state of the offers it appears, that so far from any loss having arisen from the interference of the defender, there has been an actual gain of several thousand pounds in consequence of the offers which he made; and, in such a case, the Court will never exert its equitable powers to the effect of subjecting the defender in a heavy loss.

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In the case of Whitstonhill purchased by William Johnston, and where the next highest offerer was preferred, the common agent (Mr. Dick, than whom no person better understood or more strictly fulfilled his duty) never thought of bringing an action for the surplus price, although the articles were precisely similar with the present.

July 18, 1781.

To this it was answered for the pursuer, that the defender's argument depends upon keeping the first article out of view, while he considers the other; but the several articles constitute one contract, and the meaning must be ascertained by a view of the whole; and that view proves the obligation to have been granted for the difference betwixt the one offer and the other; the only purpose for which the clause could be inserted. The claim does therefore depend upon the contract.

Answer for the Pursuer.

It is a mistake to suppose, that the clauses in question constituted a penal obligation, subject to the modification of the Court, it is a fair and equal contract, by which the expositor is to receive the full price of his lands and no more: And as there is an obligation to this extent, the Court cannot deny action upon it.

With regard to the advantage arising from the defender's offers, it is impossible to ascertain them; for although there may be many persons present at a sale who mean to give a sum nearly equal to what is offered by the person preferred, yet, when his offer exceeds their's, they remain silent.

Lord Justice Clerk—The question before your Lordships is, Whether a claim lies in this case against the defender? And if it does, to what extent? This is a claim for the difference betwixt the offer made by the defender, at which he was preferred to the purchase, and the next highest offer at which the estate was carried off: and this claim arises out of the contract. When an offerer signs his offer, he is as much bound for the price as if he had signed a bond of borrowed money to the same extent. It is true, there is a further obligation upon him, he must find caution; but his failing to do so does not vacate the obligation he has come under; the creditors may or may not part with the offer; but if they do part with it, they

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they may, *ex contractu*, claim the difference betwixt that and the next highest offer.

Lord Swinton—His Lordship said, that he had great difficulty in this case: the whole depends on the construction of the clause which declares the difference betwixt the one offer and the other to be exigible. The words of that clause did not appear to his Lordship to be sufficient; he thought that there should have been an express obligation to pay the difference, whereas the articles say, only “But prejudice to the seller to make good his claim for the difference.” The claim must be founded either on an express agreement or upon equity; but here there is no express obligation, and there can be no equity in rendering the defender liable, when, by his means, several thousand pounds have been put into the pockets of the sellers.

Lord President—His Lordship said, he had been once of the opinion delivered by the Lord Justice Clerk; but that now he had difficulties in admitting that opinion. When the highest offerer was by unavoidable circumstances prevented from finding caution within the time limited, and afterwards came forward with his bond of caution, the Court were unwilling to take advantage of these circumstances; but it occurred to some of the judges, that the forfeiture in that question was attended with no penal consequences, and that the next offerers had acquired an interest of which they could not be deprived. The next offerers were accordingly found to be entitled to a preference. But that point being settled, we come now to the question, Whether we shall subject the highest offerer in a penalty; but it is said, this is not a penalty, it is the difference betwixt the highest and the second offers. I can, however, make no distinction betwixt the two cases. If it is to be put on the footing of a claim of damage, then let the party show that there has actually been damage sustained; and I, for my part, shall give effect to it. But so far from this, take away the addition made to the price of the subject through this man's offers, and you deprive the sellers of several thousand pounds. Your Lordships will not therefore subject this man in damages. It is true, there may be said to be damage, in so far as the offer made by the defender has not been implemented; but when I know that this loss arose not from his fault but from chance, I must hesitate to lay this damage upon him.

Lord Rockville—His Lordship put the case that there had been a great number of offerers, all of whom had failed to the first and lowest offerer; to which the Lord President observed that we must decide every case upon its own circumstances.

Lord

Lord *Henderland*.—His Lordship observed that the clause in question was a very proper one, and ought to be inserted in articles of roup. His Lordship allowed that there was something in the doubt which had been suggested from the manner in which the clause was worded, the expression, “but prejudice,” can scarcely be construed into an obligation. But the question here was, what was the extent of the damage actually sustained, and it appeared to his Lordship that the damage was precisely the difference betwixt the two offers.

Lord *Eskegrove*.—What is the import of the articles as they stand. The offerer must no doubt find caution; but failure does not free him from the obligation; he might have been forced to pay the price. But there is another clause which gives the next offerer a *jus quasitum*, and the next offerer has accordingly acquired the purchase. The question then is, does this failure deprive the seller of the difference betwixt the highest and next offer: had this claim rested on an obligation, it would have been one to which the court must have given effect. Now, have the articles expressed this? The words would convince any offerer, that on his failing to find caution, he was bound to pay the difference betwixt his own and the next offer; for what else could be the meaning of the reservation of a claim against him, in the event of the seller's having recourse to the next offerer, but that the seller might have it in his power to claim from him the difference betwixt the two. But altho' this were a clear condition in the articles, it is to be considered whether this claim be in itself a just one; and it does not appear to me to be so unjust as it has done to others of your Lordships. The offer was a declaration, that in the opinion of the offerer the lands were worth the sum offered; then why should not the seller receive this price? There has been some unforeseen accident, we are told, which prevented the first offerer from finding caution within the time prescribed by the articles of roup. But after that time the seller could not have accepted of the cautioner, or he might have got the full price; but since he could not accept of the full price in consequence of the clause in favours of the second offerer, the difference is a loss, which *ex contractu* must be due by the first offerer.

Lord *Hailes*.—The expression, “but prejudice,” might have been much better expressed; but there is here a written obligation, and your Lordships will not, from the circumstance of an advantage having arisen from this man's offers, give him relief from his obligation.

The court when this cause came before them in memorials pronounced this judgement: “Find the defender liable to the pursuers in the sum offered by him at the roup, in so far as

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“it

Judgement.

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“ it exceeds the sums offered by the immediately preceding
“ offerers, and also in the expences necessarily incurred by the
“ pursuers, in consequence of the defender having failed to
“ find caution, and remit to the Lord Ordinary, &c.” And
to this judgement the court adhered, on advising the petition
for the defender, with answers for the pursuers.

For the Pursuer, R. Corbet, } Advocates. Hugh Corrie, C. S. } Agents.
Defender, D. Cathcart, } Cha. Stewart, C. S. }
Lord Stonefield, Ordinary. Home Clerk.
Vol. IX. No. 15.

COMPETITION.

I. HENRY BUTTER of Pitlochrie, Esq;

AGAINST

Sir JAMES RIDDEL of Ardnamurchan, Baronet.

Where part of a tenant's crop has been arrested the landlord ought not to affect it under his right of hypothec, if there be sufficient besides : and where he does, he is bound to assign to the arrester for his relief his right of hypothec over what remains.

C A S E
I.

Mr. Butter having arrested part of the crop and stocking of a farm possessed by his creditor Donald Campbell on the estate of Sir James Riddel, who had a right of hypothec over the whole; and having pursued a forthcoming, he intimated his right under form of instrument to Sir James when he was proceeding to roup the crop and stocking of the tenant under a sequestration. Sir James, however, paid no attention to this intimation, but proceeded to roup the whole crop and stocking, though amounting to double the extent of his hypothec; and amongst other points, it came to be questioned betwixt Sir James and Mr. Butter, whether Sir James had it in his power to satisfy his hypothec, in the first place out of the arrested stock, to the effect of enlarging the fund for answering that part of his debt which was not covered by the hypothec, or at least to draw what was covered by his hypothec, proportionally out of that, and the other parts of the bankrupt's stock.

Opinions.

The court were of opinion that Sir James had a right of hypothec over all the stocking for his rent; that the whole was sequestrated, through the rents covered by the right of hypothec did not extend to one half of what was sequestrated. That a sequestration does not vest a right of property. The crop and stock under sequestration remain the property of the tenant



nant under the custody and disposal of the Court; when therefore landlord proceeds to sell, he should sell for ready money, or at least for good bills; and when he has sold to the extent of the rent for which he has a right of hypothec, there he ought to stop; he has no right to go farther. That as no part of the crop or stocking had been attached by the diligence of creditors, excepting what had been affected by Mr. Butter's arrestment, the landlord ought to have recovered from the free stock, and not from that part which had been attached by diligence; or if he found it necessary to interfere with that part of the stock, he was bound to assign his right of hypothec to the arresting creditor to the extent of what he had taken away, that that creditor might be enabled to operate his relief.

Pursuer, Smythe, } Advocate. William M'Donald, } Agents.
Defender, } William M'Ewan, }

Vol. II. No. 9.

CURATOR.

I. JOHN HALIBURTON, Esq; Inspector of Stamp-duties for North Britain, &c. Petitioner;

AGAINST

DAVID MAXWELL, Esq; Advocate, Respondent.

A husband is the proper curator to his insane wife, notwithstanding of a previous voluntary separation before the commencement of her disease.

David Maxwell, Esq; the respondent, was married to Miss Anne Haliburton. Some time after the marriage a voluntary separation took place and the wife having afterwards lost her judgement, an application was made by the petitioners for the purpose of having a factor *loco tutoris* appointed for managing her affairs.



The Court refused the application, as the husband was the proper curator for the wife. The separation had no influence on the question, for a voluntary separation depends on the will of the parties; and as the wife can have no will during the continuance of the disease, the contract of separation must be held to be at an end.

Home Clerk.
Vol. II. No. 15.

X 2

J. JAMES

I. JAMES RUSSEL Upholsterer in Edinburgh;

AGAINST

JOHN SIMES Saddler in Coupar of Angus.

A Creditor is not entitled to the expence of his decree of constitution out of the executry funds.

C A S E
I.

Adam Leitster died in September 1788, and James Russel, a creditor of Leitster's brought an action against the widow, who had been decerned executrix; and in this action he obtained a decree in absence, for payment of an account due to him, and for a random sum of expences. This decree was produced as an interest for Russel in a multiple poinding raised by the widow. The judgement of the Lord Ordinary, in regard to Russel's claim of expences, was in these words: "Finds, " that as to the random sum of expences contained in his decree, he is not to be ranked at all, nor for any expences " whatever, in respect of the general rule laid down by the " Court, in the case observed by Lord Kilkerran *voce* expences."

This judgement was brought under review of the Court, and it was pleaded for Russel the claimant, that although the expence of a decree of constitution cannot be personal against the executor, because the decree is the warrant, without which he cannot pay in safety, yet the estate of the debtor certainly ought to be applied in payment of his debts; and a creditor cannot be said to have received complete payment where he has been obliged to lay out money to obtain a decree. In the case of a bond containing a penalty, a creditor would be entitled to the expence of his decree; and so far as this is regulated by principle, there does not appear to be any reasonable distinction betwixt the two cases.

To this it was answered by Simes the objecting creditor, that the decision referred to by the Lord Ordinary is a sufficient foundation for the judgement which his Lordship has pronounced. But there is besides another decision, which solves the supposed case of a claim for expences founded on the penalty in a bond. This decision is to be found in Kilkerran under the head executor, No 6, " Regularly an executor " against whom decree is obtained is not to be found liable in " expence, because he cannot safely pay without a decree for " his warrant; but where the debt was due by a bond containing a penalty, as the penalty is no less the defunct's " debt than the principal sum, the creditor was found entitled " to the penalty to the extent of his expence, which would " be allowed to the executor at accounting for the executry."

The

The Court adhered to the judgement of the Lord Ordinary.

It was the opinion of the Court, that where a creditor must constitute his debt, he has no claim against the executor for the expence of the constitution. Lord Eskgrove mentioned, as an exception, the case where the executor litigates the cause, and opposes the constitution.

C A S E

I.

Judgement.

For the Claimant, Dav. Williamson, } Adv. J. Young, } Agents.
Objector, James Turnbull, }

Lord Dreghorn, Ordinary. Home Clerk.

Vol. II. No. 10.

II. JOHN BALLENDEN of Wester Pitgober, Pursuer ;

A G A I N S T

His Grace JOHN Duke of ARGYLE, Defender.

A vassal cannot be allowed to purge the irritancy *ab non solutum canonem*, where a decree of declarator of the irritancy, *in foro contentioso*, has been obtained and extracted.

John Ballenden held the lands of Wester Pitgober in feu of the family of Argyle for a feu duty equal to about L. 7 Sterling. The value of the lands, according to Ballenden's account, was upwards of L. 3000 ; but from a certified estimate given in on the other side, their yearly value is said to be no more than L. 72 Sterling.

C A S E

II.

In the 1771 Ballenden refused to pay his feu-duties to his superior, on account of damage said to have been done to his farm by working coal. In the 1775 he went further, and insisted, that he had a right to the coal. This produced a declarator at the instance of the Duke of Argyle for having his right ascertained, and a suspension on the part of the vassal. In these actions, which were conjoined, decree was given in favour of the Duke.

Ballenden still continued to retain the feu-duties ; and at last a declarator of irritancy of the feu was brought, founding on the act of parliament 1597, c. 246, at which time the arrear of feu-duties, with interest, amounted to L. 55. In this action decret in absence was pronounced in terms of the libel. Against this sentence a representation was presented for Ballenden, stating, that the superior in working his coal had greatly damaged the surface ; that this damage exceeded the amount of the feu-duties, and that it had been with a view to bring about a settlement of his claims against the superior that the feu-duties had been retained.

The

C A S E

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The decret in absence was recalled, and parties were appointed to debate. The cause was called; still no appearance was made for Ballenden. A decret was again pronounced against him; a second representation was presented on the same grounds with the former, and craving a proof of the damage which the land had suffered. This representation was refused on an answer, and the former judgement adhered to. The Duke then proceeded to take a decree of removing against Ballenden (1779,) on which letters of horning, ejection, and caption followed.

Ballenden, in order to get quit of these proceedings, brought an action of reduction for setting aside the decrees which had been obtained against him by the Duke. In this action the necessary forms having been gone through, and the cause pled before the Lord Ordinary, his Lordship having considered "the decree obtained, *in foro contentioso*, by the defender, the Duke of Argyle, against the pursuer John Ballenden, repels the reasons of reduction, assoilzies the defender, and decerns."

As this question turned chiefly on the decree of declarator having been obtained *in foro contradictorio*, the pursuer insisted, that as he was confined to bed, and unable to attend to business when appearance was made in the action of declarator, and as he had given no authority for stating any defence, the decree in that action was to be considered as pronounced in absence, and the following decisions were referred to in support of this plea. December 17, 1701, Surgeons of Glasgow v. Reid. Fountainhall, 29th December 1692, Philip v. Ogilvy. Forbes, 14th December 1711, Representatives of Smith v. Semple.

Another ground taken up by the pursuer, was, that he held, upon an erroneous title, the precept of *clare constat* in his favour had been granted to him as son of the former proprietor, whereas he was the nephew of that person. That as this title could have carried no right to his disponent, neither could a declaratory action against him, as feudal proprietor of the subject under this title, have the effect of carrying off the subject.

But the answer made to this was, that his title, whatever objections might originally have lain to it, was now confirmed by prescription, as he had possessed on it uninterruptedly for more than forty years. Dict. Vol. III. p. 299. Feb. 7. 1766. Janet Millar v. Dickson, Fac. Coll.

Another ground was the misnomer of the subject. In the declarator it was called Pitgogar instead of Pitgobar; and the case of McDonald v. the King's advocate, Falconer, Dec. 21. 1751, was resorted to as analogous, as were also these decisions, Kilkerran, January 16. 1739, Reid v. Kerr. July 6. 1753, Dalgliesh v. Hamilton.

To this it was answered, that the description of the lands in the decree of declarator was taken from the pursuer's infestment in the subject, and corresponds precisely with that description. Besides, the description is otherways so comprehensive, that it sufficiently marks out the lands in question, nor can there be the smallest doubt on that head.

On the merits of the action of declarator, the pursuer of the reduction insisted much on the change which had taken place in this country during the course of the two last centuries. That a law, which in the 1597 was just and equitable, as the feu-duties might then be supposed nearly equivalent to the real rent, had now totally altered its nature; the feu-duty at present bears no proportion to the increased value of the feudal subjects, and the irritancy is rigorous and unjust, which at a former period might have been proper. Equity will not permit a valuable subject to be carried off for a few shillings, which the proprietor, from the most innocent omission, may have neglected to pay up; and accordingly the authorities of the law support this equitable view of the case. Erskine, B. I. tit. 5. § 27. and tit. 8. § 14. Dictionary *voce* irritancy, and an uncollected case, Viscount of Stormount v. Bell of Whitestenhill, * decided in the 1781. In this case, the Viscount having obtained a decree of irritancy against Bell his vassal, *in foro contradictorio*, in consequence of which he insisted that a sale pursued by Bell's creditors could not proceed, the estate being now his property. The Court over-ruled the plea, and allowed the sale to go on, in which the Viscount was ranked for the arrear of feu-duty.

The Duke, on the other hand, rested his plea on the act of parliament, which was, he insisted, still in force, and could not be overlooked by the Court. Erskine, B. II. tit. 1. § 27. never supposes it possible to purge either legal or conventional irritancies after decree has been extracted. The case of Moncrief of Bleakburn in the 1773 was quoted as a case in point.

When this cause came to be decided, there was a minute lodged, in which the pursuer, in answer to questions put by the Court, stated, 1. That he had been offered L.3000 for the subject, which was less than what he conceived to be its true value. 2. He produced money at the bar, and desired the agent for the noble Duke to take therefrom what was due to the superior of bygone feu-duties, *cum omni causa*, both interest

* This case was decided by the Court in the manner stated by the pursuers, but it cannot be considered as a precedent, the point of law was contested; and as the object of the superior was solely to secure his feu-duties, which was sufficiently done by a claim in the sale, the Court, without entering into the merits of the question, allowed the sale to proceed.

C A S E.
II.



and expences. The council for the Duke answered, that he had been used ill for above twenty years by the pursuer. His Grace had not been guilty of rigour towards him, and from his known character, was not likely to be rigorous in the end. But that in duty to himself it was necessary that it should be known whether the act of parliament, to which he had been obliged to resort for justice, is or is not a subsisting law.

Judgement of
the Court.
March 2. 1791.

The Lords having advised this petition, with the answers, together with what is above represented, they adhere to the Lord Ordinary's interlocutor, and refuse the desire of the petition.

And a second reclaiming petition being advised, with answers, was refused.

The Court in this case, although they thought it a rigorous one, seemed to consider themselves as bound down by the extracted decree of declarator.

For Pursuer, William Honyman,	} Ad.	J. Moir, C. S.	} Agents.
Defender, A. Campbell, jun. W. Craig,		J. Ferrier, C. S.	
Lord Dreghorn Ordinary.		Colquhoun Clerk.	

Vol. IX. No. 6.

ENTAILS

I. The Right Hon. JOHN, Viscount of Arbuthnot, Pursuer,

A G A I N S T

The Hon. JOHN, Master of Arbuthnot, &c. Defenders.

An heir of entail having made up his title to the entailed estate, as unlimited proprietor, and afterwards executed a new entail, comprehending the entailed property, as well as a separate estate, which he held in fee simple, the new entail was reduced, in so far as it related to the property originally entailed, the conditions of the two entails being incompatible.

In the 1733, John, then Viscount of Arbuthnot, executed a disposition and deed of entail of the estate of Arbuthnot, of which he was unlimited proprietor; the destination was to John Arbuthnot of Fordun, and the heirs-male of his body, &c. This deed is guarded by prohibitory, irritant, and resolute clauses; but it is so far incomplete, as to contain neither procuratory nor precept of seisin. It was deposited with Mr Skene of Skene, in whose hands it remained till the death of the granter in the 1757.

C A S E
I.

Arbuthnot of Fordun, the institute, was now dead, but his son took up both the title and estate, as heir of line to the granter of the entail. It appears that he was advised to make up his titles under the entail 1733, but he rather chose to complete them as unlimited fiar. He was served heir and infest in the 1758. This was the late Viscount of Arbuthnot; and from the 1758 he possessed as unlimited fiar down to the 1777; he then executed a new entail of the estate of Arbuthnot, and of his paternal estate of Fordun; the destination in this deed was to the same series of heirs as in the taillie 1733, with this distinction, that, failing the heirs-male, the former deed gave the estate to heirs-female, the eldest heir-female succeeding without division; whereas this last deed, failing the heirs-male, gave the estate to the nearest heirs and assignees of the granter whomsoever. By this last deed, too, it was declared that the estate should be held by that deed, and by no other right or title whatever. It is likewise guarded by prohibitory, irritant, and resolute clauses, and was recorded in the registers of taillies by the late Viscount, but no charter or infestment was expedited on it.

The late Viscount died in the 1791. By his death the present Viscount, his only son then in life, succeeded to his personal as well as to his real estate, and intromitted with the former to the extent of 30,000 l. Sterling. At this time the

X

entail

C A S E

I,



entail executed in the 1733 had not been discovered. When it afterwards appeared, and he found that it might be considered as still in force, he wished to complete his title under it; and with this view he brought a reduction of the service and infestment in favour of the late Viscount as unlimited fiar, and of the entail which had been executed in the 1777. This action, the ordinary forms being gone through, came before Lord Eskgrove, who took it to report to the Court.

Arguments of
the Parties.

The pursuer, founding on the deed 1733 as a subsisting deed, contended that the late Viscount had forfeited his right to the estate of Arbuthnot by incurring an irritancy under that deed, and had no right to execute the entail 1777. To this plea the following objections were stated for the defenders. 1st, That the deed 1733 was incomplete, as containing neither procuratory of resignation, nor precept of seisin. 2d, That it was neither delivered, nor contained a clause dispensing with the delivery. And, lastly, that it was cut off by the negative prescription.

To these objections the pursuer answered, 1st, The taillic 1733, though it wants a procuratory and precept, contains obligations binding on the heir, and the late Viscount ought therefore to have made up his titles in conformity with the entail.

2d, The taillic 1733 was a deed of such a nature as to be effectual without delivery; at any rate, it was delivered for behoof of all concerned to the late Mr Skene of Skene.

To the last objection it was answered, That, before the death of the granter of the deed, (which happened in the 1757), there were not *termini habiles* for prescription of any kind, and since that time the years of prescription have not run.

There was another argument stated for the pursuer, which related to the estate of Fordun. It was said that the entail of that estate was *contra fidem tabularum nuptialium*; for, by the Viscount's marriage-contract in the 1748, he was taken bound to secure the whole lands to the heir-male; and it was by no means an implement of that obligation to give the estate under an entail.—*Authorities*, Kerr of Abbotrule, January 23. 1747; Kilkerran, July 17. 1751, Strong v. Strong; July 25. 1761, Sir John Douglas v. Douglas.

To this the defenders answered: It was no infringement of the obligation in the marriage-contract to convey the lands under an entail, the conditions and limitations of which are intended the more completely to preserve the estate to the heirs of the marriage. The father has a power of laying the heir under reasonable restrictions, for the preservation of the family in general.—*Authorities*, Lord Stair, B. ii. tit. 3. § 41.; Bankton,

Bankton, B. ii. tit. 3. § 134. § 153.; Erskine, B. iii. tit. 8. § 30. Thomson v. Thomsons, February 11. 1762.

C A S E

I.

When this case came to be advised, Mr Wight, for the defenders, represented, that the pursuer was barred from insisting in a reduction of the deed 1777, on this additional ground, that he had uplifted 30,000 l. of his father's ready money, which exceeds far the value of the estate of Fordun.

The Dean of Faculty, for the pursuer, answered, That, supposing this to be the fact, and that it would have been relevant, if the estate of Fordun had been the only subject of the tailie 1777, yet, as that deed included the estate of Arbuthnot, and contained an express provision that both the estates should be held by the same title, it was *ultra vires* of the late Viscount to annex an impossible condition to the tailie of Fordun, which certainly was the case if the deed 1733 was a valid tailie.

The Judges, in delivering their opinions, agreed that there were no *termini habiles* for the plea of prescription, and that the deed 1733 was an existing deed. They were of opinion that there was no material change in the destination of the original entail, and that the pursuer was bound, as representing his father, to give effect to the tailie 1777. In the course of the debate, it was observed by the Lord Justice Clerk, that it had not hitherto been decided, whether a person bound by his marriage-contract to provide his estate to the heirs of his marriage was at liberty to settle it on the heir by an entail? He said, he had always understood that such a power was in the father. The meaning of the obligation is, to secure the succession to the heir of the marriage; and, surely, to put it out of the power of the heir to dilapidate that estate, was not inconsistent with the nature of the obligation. The Lord President suggested a plea, as striking against the marriage-contract entered into by the late Earl in the 1748, which had not been taken notice of in the papers. His Lordship observed, that a marriage-contract was a mutual deed; and, although, in this case, there had been no nomination of trustees at whose instance execution might pass, yet the relations of the wife were entitled to have seen the conditions of the contract implemented; and, although no person could have claimed the lands during the lifetime of the late Viscount, yet the Viscount had become bound by that contract to pass a charter, and instantly to provide his lands to the heir of the marriage; and therefore his Lordship was rather inclined to think that this obligation had fallen under the negative prescription. On this the Lord Justice Clerk observed, That he hoped their Lordships would take care not to decide in this way

Opinions.

C A S E

I.



way the question of prescription on a marriage-contract. It was a question of the utmost importance to the public, and, were such prescription sustained, it might lead to the most dangerous consequences: That, for his own part, he had no notion that a father could acquire a right to himself by the negative prescription running in his favour, on a contract lying in his own possession; but that here there was no occasion for deciding the question.

Judgement.

The judgement of the Court was in these words: "Upon the report of Lord Eskgrove, &c. the Lords repel the objections to the deed 1733, and find, that the pursuer, as representing his father, is barred from challenging the deed of entail executed by him in the 1777, and therefore assign the defenders from the whole conclusions of this action, and decern."

Argument for
the Pursuer.

Against this judgement a reclaiming-petition was presented for the pursuer. He stated, that the decision had embarrassed him in a very singular manner; for, holding the deed 1733 to be effectual, he cannot take up the succession under the deed 1777 without incurring an irritancy, as the destination in the two entails are different; in the former, failing the granter's heir-male, the estate goes to the granter's heir-female, the eldest succeeding without division; whereas, by the latter, the destination, failing the heirs-male, is to the granter's own nearest heirs and assignees whomsoever; so that the eldest heir-female, in place of having a taillied succession, which could not be disappointed, has nothing more than a *spes successionis*, amongst with the other heirs-portioners, which may be disappointed by the last heir-male.

On the other hand, if, disregarding his father's settlement, the pursuer should make up a title under the taillie 1733, he would incur an irritancy under the deed 1777.

In this situation, the pursuer contended, that, under the passive title, he could be obliged to perform such possible conditions only as his father had imposed; but that the conditions of the entail were impossible, and therefore must be fatal to it; for, if an entail be set aside as to one part or condition, it cannot stand as to others; because, *non constat*, that, had the granter conceived that condition to have been ineffectual, he would have executed the deed.

Argument for
the Defenders.

To this it was answered for the defenders, That they cannot admit the proposition in the present case, that an entail cannot be set aside in part. The only difference betwixt the destinations is, that by the first the taillied succession may be carried on after the estate devolves on the heirs-female; whereas, by the

the

the last, they can only succeed in the character of heirs whomsoever. There is therefore no reason to suppose, that, had the granter known at the time of executing the entail 1777, that he had no authority to make this alteration on the succession, he would not have executed the entail. Therefore, although the entail 1777 could not be the rule of succession, it may yet be sustained, in so far as it imposes new limitations on the heirs of entail. This would remove every difficulty. As the entail 1733 does not impose any necessity on the heirs to possess on that deed alone, the pursuer will incur no irritancy by inserting the conditions, &c. of the entail 1777; at any rate, in consequence of his intromissions, the pursuer is bound to possess under the conditions of the entail 1777, even should it be thought that these clauses did not limit the subsequent heirs.

The Court were of opinion that to support one part of a will and to cut down the other was impossible, but a distinction was made betwixt that case, and cutting down part of a deed, where that part was null from want of power in the granter. Were a person, for instance, to entail his estate, and in the same deed to include an estate belonging to another, it was said that the entail would be void in so far as it related to the estate which did not belong to the granter, but there was no reason why that deed should not have effect, in so far as it related to the estate over which the granter had the entire disposal; and on this ground the entail was found not to extend over the estate of Arbuthnot.

From the value of the two estates not having been explained, some of their Lordships stated a doubt, that the provisions being proportioned to the whole property, might be too great for the entailed subject, now that so large an estate was taken out of the entail; and that the heirs by granting too large a provision might bring the entail to an end; but, in answer to this, it was observed, that, altho' the heirs had such power, they were not obliged to use them; or, supposing they did thereby put an end to the entail, they would do no more than what must be produced by giving effect to the objection. Besides, this is truly no ground on which to reduce the entail entirely. In the case of Kinross, where the heir had it in his power to give such large provisions as might have enabled him by that means to defeat the entail, a reduction of it brought on that ground was dismissed.

One of their Lordships allowed, that, were a trifling burgage subject to be entailed alongst with a large estate, and the entail to be reduced in so far as relating to the estate, it might be absurd to continue the entail over the burgage tenement, and

C A S E
I.

and that in such a case the court might reduce the deed in whole.

Judgement.
July 3. 1792.

The Lords reduce the entail 1777, as to the estate of Arburthnot, but refuse the petition *quoad ultra*.

For the pursuer, Dean of Faculty, Dickson, } Adv. R. Ross, C. S. } A.
Defender, Wight, } W. Dunbar. C. S. }

Lord Eskgrove, Ordinary.

Gordon Clerk.

VOL. IX. No. 18.

II. HENRY PIERSE, Esq; and his ATTORNEY, Pursuer and Chargers,

AGAINST

MR JOHN RUSSEL, Clerk to the Signet, Suspender, and HUGH ROSS of KERSE, and the Heirs of Entail, Defenders.

When an entail is personal, (although it may have been recorded), and where the institute is heir of line of the granter, and possesses without completing his title by infeftment as heir of entail, his creditors may, by special charges and adjudications, carry off the entailed estate, no previous steps having been taken by the heirs of entail to complete their right.

C A S E
II.

1756.

The late Mr Hugh Ross merchant in London was proprietor of the lands of Kerse, and stood infeft in them. He executed an entail of these and other lands, in favour of Hugh Ross his eldest son, and the heirs of his body; whom failing, to a certain series of heirs thereby *nominatim* called to the succession; and it is provided and declared, "That it shall not be lawful to the persons *nominatim* instituted and substituted in the above appointed succession, or their heirs, or any of them succeeding to the said estate, but they and every of them, is, and are hereby prohibited to sell, alien, dispose, or convey the right of property or superiority of the foresaid estate, or of any part thereof; or to contract any debt or debts, or to enter into any covenant, contract, or agreement, &c. whereby the right of property or superiority of the said lands and estate, or of any part thereof, may be charged, incumbered, adjudged, forfeited, &c. or evicted by adjudication, sale, or otherways, from the succeeding heirs above appointed,"

"appointed," &c; and every act and deed done contrary to this prohibition are declared to be null, and the person contravening is to lose all right to the estate; with this exception, that he may convey the yearly produce of the estate, during his lifetime, in extinction of his debts. The clauses irritant and resolute are ordered to be inserted in the after titles of the estate, under the pain of forfeiture; but there was no obligation on those in possession to hold under the entail.

This entail was recorded in the register of tailies upon the application of the entailer; but no infeftment followed upon it. The entailer died in the year 1775, and was succeeded by Hugh Rofs, the institute, his eldest son, who expedite a general service as heir of line to his father, and a special service as heir to his father in certain other subjects that were not comprehended in the entail. With regard to the estate of Kerse, contained in the entail, there was no occasion for a service, as the procuratory and precept were conceived in favour of Hugh Rofs the son; but he made up no title to these lands.

The entailer had contracted considerable debts, and Hugh Rofs the son had likewise contracted debts; amongst others, he had contracted a debt to Mr Pierse of 4000l, on which Mr Pierse obtained a decree of adjudication against him, as lawfully charged to enter heir in special to his father, which was completed by a charter and infeftment in the lands holden of the crown, and by charges against the superior where the lands held of a subject. Other creditors having proceeded to adjudge, the estate was brought to a judicial sale, when it was purchased by Mr Ruffel at the price 18,700l.

In these circumstances, it was the object of the creditors to take the entail out of the way, that it might not carry off the estate which they had attached as the property of their debtor; and it was equally the object of the purchaser that the rights of the heirs of entail should be fairly tried, that he might be enabled to pay the price with safety: accordingly, an action of reduction was brought by Mr Pierse, the principal creditor, for the purpose of setting aside the entail; in which action Mr Rofs and the heirs of entail were called; and at the same time a suspension was raised by Mr Ruffel the purchaser, both of which actions were conjoined and taken to report on informations. The court also ordered the informations in the case of Douglas of Kilhead * to be reprinted and laid before the court when this question came to be advised.

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* This is in itself so important a decision, and was so much founded on by the judges in delivering their opinions in the above case, that no apology can be necessary for subjoining here an accurate report of it.

C A S E
II.

The pleading for the charger was supported so nearly by the same arguments, and illustrated by the same cases, which were urged

WILLIAM DOUGLAS, Esq; eldest Son of Sir John Douglas of Kilhead,

AGAINST

WILLIAM STEWART, and Others, Creditors of Sir John Douglas.

Sir William Douglas was absolute fiar of the lands of Cumbertrees; he executed an entail of these lands in favour of himself in liferent, and his son, afterwards Sir John Douglas, and the heirs-male of his body, in fee; whom failing, the estate went to certain other substitutes. This entail was recorded in the register of taillics, but no infestment followed upon it.

Sir John the institute having succeeded to the estate, possessed as apparent heir, and contracted considerable debts: his creditors charged him to enter heir in special to his father Sir William Douglas, and thereupon adjudged the estate. These adjudications were completed by infestment, and a process of ranking and sale was raised at the instance of the creditors, including these, as well as certain other lands, belonging to Sir John Douglas.

William Douglas, son of Sir John, one of the substitutes in the entail, entered an appearance in the process at the instance of the creditors, and insisted that the lands of Cumbertrees should be struck out of the sale, in respect of the recorded taillic.

The Lord Ordinary before whom this question came repelled the objection, and found that the lands ought not to be struck out of the sale; and, on advising a reclaiming petition against this judgement, the Court, that the cause might be more fully and deliberately decided, ordered memorials to be given in. On the part of the creditors the following argument was maintained.

I. *View of the case on the supposition that no diligence had been done by the creditors.*

Argument for
the Creditors.

The entail in question remains to this day a personal deed. Sir William Douglas stood vested in the lands as an absolute and unlimited fiar; and, had Sir John made up his titles as heir of the investiture, his whole debts and deeds must have been effectual against the lands.

This is founded on the words of the act 1685. Two publications are thereby required to render an entail effectual; the one in the register of taillics, the other in the register of infestments. Both are required; neither is effectual by itself; Creditors of Patrick Oliphant of Bowhilton v. Lord Oliphant, 1751; and the same has been found in a separate point of the present cause. It follows, then, that the registration of the entail in the register of taillics must be laid out of the question. So long as a taillic remains a personal deed, it is neither better nor worse for being recorded. If the party has no other title to the estate, the conditions of it must necessarily qualify his right, and must be effectual against creditors and purchasers, as they never can reach the estate but through the entail, and every person contracting on the faith of a personal right must be presumed to know the nature of that right; but, where the party has a separate title to the estate, the taillic can have no earthly effect. Where one contracts with a person in possession of an estate, in the fee-simple of which either he or his predecessor stand vested, the person contracting with him as unlimited fiar is in *optima fide*.

This question, then, must be judged of in the same way as if the entail had not been recorded; the creditors are not bound to know of it; and thus the present question becomes a matter of very general importance. In the circumstances

urged for the creditors in the case of Kilhead, that the general outlines of the pleading will be sufficient.

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circumstances of this case, and after creditors had contracted with Sir John Douglas upon the faith that he could make up titles to the estate as a fee simple, and that on his failure they had a right to force him to make up his titles, in that manner it would lead to most alarming consequences were it in his power to carry off the estate, by producing a latent and personal deed of entail. But, as this would be an inlet to the greatest frauds, it will not be listened to, neither is it consistent with the law of Scotland.

It has thus been shown that the entail would not militate against creditors, had Sir John made up his titles as heir, under the former investiture; his long possession as apparent heir must have the same effect. The statute 1695 authorises the lieges to contract with an heir three years in possession. It has created such a connection betwixt that heir and the estate, that no after-heir can take up the estate, without being subjected to the onerous debts and deeds of the apparent heir three years in possession, to the extent of the value of the estate; it follows that Sir John's creditors, who transacted on the faith of his apparency, cannot be affected by a latent personal entail, Sir John cannot object to his creditors his own defect of right, and the other heirs of entail cannot reach the estate without falling under the purview of the statute.

To this reasoning the heir of entail answered, That the act 1695 will Objection by not support the argument; 1st, because Sir John is alive and the heir is not the heir of entail, insisting to make up his titles passing him by; 2d, because, admitting that tail. Sir John were dead, the heir would not make up his titles in that manner, but would serve himself heir in general to Sir John, by which he would carry the unexecuted procuratory in the deed of entail, and would thereupon infect himself in the lands.

The reply made to this was, That, by the force of the statute, the estate Answer by the is *in valorem* subjected to the debts of the apparent heir. So long as it remains in the person of Sir John, it is affectable by his creditors; and, were he divested by a declarator of irritancy, and his son the pursuer to complete his right, by making up titles to the person last infected, he would subject himself in payment of Sir John's debts to the value of the estate. The estate would be liable *in valorem*; nor would any subsequent heir be entitled to compete with the creditors. When the heir of entail talks of completing his titles, (in the event of Sir John's death), by taking up the unexecuted procuratory in the entail, he proceeds on the supposition that Sir John had no right to the lands but through the entail, whereas he had the right of apparency; and therefore the heir could not take up these lands without being liable under the statute 1695.

But the heir of entail objects further, That the analogy of the act 1695 Objection by will not apply to this case; for the foundation of the statute is, the heir's the heir of entail. possessing upon his title of apparency. Should he have possessed on any other title, the case is not within the statute; as was determined in Kin-minity's case. Now it is plain that Sir John neither did, nor could legally possess, on any other title than the deed of entail in which he was the institute. Besides, the statute never was meant to regulate a competition between a substitute heir of entail and the creditors of the heir in possession; were the act to be applied to such a case, it would open a way not hitherto thought of to defeat entails; for, if the institute were heir at law of the grantor, his possessing for three years on apparency, which might happen where the next heir was a minor, or was not in existence, the estate would be subjected to his debts and deeds, it might be carried off by the diligence of his creditors, and the entail, in this way, be brought to an end.

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statute requires that the irritant and resolute clauses of the entail should enter the investitures; yet there is nothing in this clause, from which it can be inferred, that, while the entail remains a personal right, and before investment has followed upon it, it is not effectual against the debts and deeds of the institute or substitutes. Had Mr Ross possessed under titles in which the clauses irritant and resolute were not inserted, purchasers and creditors contracting with him would have been secure. But as he has only a personal right in virtue of the procuratory in the deed of entail, and as in that procuratory all the irritant and resolute clauses were verbatim inserted, this part of the statute seems to have been completely complied with; and, as the entail was on record, no person was more at liberty to have transacted with him, than if, instead of possessing under the personal right, thus established in him, he had expedite a charter, and a seisin had followed thereon, containing all the clauses irritant and resolute.

In the case of Westshiels, it was found, that an entail, which had remained personal, was ineffectual against creditors. Yet this decision was reversed in the House of Lords, on this ground, that as no investment had followed upon it, the creditors could not plead that they had transacted on the faith of the records: this shows that an entail may be effectual, although no investment has passed upon it, in which the irritant and resolute clauses could be inserted.

The creditors have supposed that Mr Ross possessed as apparent heir to his father; but there is no room for a presumption of this sort, when it is considered that a personal right was vested in him by the entail.

Opinions:

Lord *Justice Clerk*.—His Lordship said that he should give his opinion in few words. It is a well founded proposition, that, in order to secure a land estate against creditors or purchasers, two things are necessary. 1st, That the entail be recorded in the register of tailies; and, 2d, That it be made real by investment. The first is the creature of statute; the other has not only the same sanction, but is founded on the common law of Scotland. Before the statute, it was understood that an entail, completed by investment, was good, though unrecorded. The statute makes recording necessary. It is true, a personal entail is qualified with all the limitations and conditions of the deed, whether recorded or not; for every personal right is, by our law, subject to all the conditions under which it is granted. When, therefore, the disponent under the entail has no right to the estate but through the entail, it is impossible for his creditors to get at the estate without attaching the personal right; and that must be taken under all the

the burdens which it contains; consequently the creditors of a disponee, in such a situation, cannot affect the estate. Yet that estate is not secured against creditors; for, until infeftment has followed on the entail, the creditors of the granter may carry off the estate by diligence. I dispone, in the form of a strict deed of entail, the disponee does not take infeftment, and I contract debts: The creditor in these debts affect the estate by real diligence, and carry it off. Therefore, two things are necessary to bring land under an entail. 1st, That the deed be recorded in the register of tailies. 2d, That infeftment be taken upon it, and regularly completed. It is a principle of the law of Scotland, that no incumbrance is effectual but what enters into the infeftment. A father disposes to his son by an entail, who, although he records the entail, does not take infeftment; on the death of the father, the creditors both of the father and son may adjudge the lands, and the entail will not strike at the diligence of either. It is the same with a purchaser who does not take infeftment; the creditors of the seller may carry off the estate. These propositions are undoubted. Mr Wight has stated, that the heir held under the entail, although he was also heir of the investiture, and that the creditor must carry the personal right. But the creditor may adjudge all and every right in the person of his debtor; and, if he find that he can make more by adjudging the *hereditas jacens*, than the personal right under the entail, he may do it. Who would adjudge a personal right, when he can adjudge a real one through a special charge? The personal right is not good until you get the disposition and complete it; but an adjudication against the estate is effectual by a charge against the superior, or an infeftment on a charter of adjudication. Therefore no man thinks of leading an adjudication in any other way. A distinction was attempted to be made betwixt heritable bonds on an estate, and adjudications led upon personal debts. It was said that the former were contracted on the faith of the records; and when the creditor saw an infeftment in fee simple in favour of the father, he was in *bona fide* to take an heritable security from the son; whereas, the personal creditor trusts to the personal rights alone, and must take them as they stand. This appears specious; but the reverse ought to hold true; for, when a creditor lends money on an heritable bond, he canvasses the titles, and he searches the register of entails &c. Law presumes that he does so; and it may be said, that, seeing an entail on record, he was in *mala fide* to transact with the borrower. But where money is lent on a personal security, the creditor is in *optima fide* to use the diligence of the law, and to attach every subject he can get at: He sees an entail, but it is informal; he is entitled to reduce it.

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it. He is therefore in a more favourable situation than the heritable creditor, who saw the entail before entering into the transaction. It was debated in Annandale's case, whether tail-lies were consistent with law. It was found that they were. They multiplied upon this decision. The act 1685 did not introduce entails, it rather abridged the power of entailing, which had been previously established at common law. The legislature seems to say to the people of Scotland, "You are exercising a power, which in England has been taken away; therefore if you will entail, it must be done in a particular form, and unless that form be complied with, your entail shall not be effectual against creditors." In the present case, the form prescribed by the statute has not been observed: although the entail has been recorded in the register of tail-lies, no infestment has followed upon it; therefore it is still open to the diligence of creditors.

Lord Henderland.—The principles laid down by the Lord Justice Clerk are clear. An entail is permitted by the law of Scotland. It is the right of a proprietor to regulate the distribution of his estate. It may therefore appear strange that an entail should be of no effect: But, though warrandice be implied in every disposition, yet, considering the heir of entail as a creditor under the warrandice, even this is not sufficient; because the act 1661, which prefers the creditors of the defunct, to those of the heir, requires diligence within three years: but there has been none here. In this case, the creditors of the heir have taken proper steps, by charges &c. They have carried off the estate from the creditors of the father. Diligence might have been done by the heir of entail, in the character of a creditor under the warrandice, so as to carry a preference under the act 1661. That appears agreeable to our feudal law; but it was not done; the only difficulty then flies off, and the Lord Justice Clerk's principles must remain clearly established.

Lord Dregburn.—His Lordship was of opinion with the Lord Justice Clerk; and his Lordship said, he had been so these twenty seven years past; that is, since the case of Douglas of Kilhead was decided. There an important rule was established. It was quoted in the case of Mitchells against Fergusson on the 13th Feb. 1781. Donald sold a house to Carson, who without having been infest in it, sold the subject to Fergusson; and neither did he take infestment. A competition arose betwixt him and the creditors adjudgers of Donald the original seller, who had followed out their adjudications by infestment. The majority of the Court were in favour of the adjudging creditors. There is no record for simple dispositions; they are not rights. There is another case, the creditors of Gillespie, which bears upon this question. A man disposed to his son-in-law who was
infest,

infest, his creditors brought an action against the creditors of the son, on the head of fraud; and it was found that the adjudging creditors of the son must be held to have adjudged the subject *tantum et tale*, as it stood.

Lord *President*.—His Lordship said that he had moved for this hearing, because he had doubts on the question. Kilhead's case is not reported. The cause appears different now; the difficulty chiefly rested on a point, which has not been cleared up by the decisions of the Court; that is, whether a personal creditor adjudger must not take the property *tantum et tale* as it stood in his debtor. The last case with which his Lordship was acquainted, was that of Douglas, Heron, and Company. A remark from the bench in that case, that such was the law, and that personal creditors adjudgers were in the same situation with their debtor, had misled him. In the case of Mitchells against Fergusson, 13th July 1781, some of the judges still thought in the same way; but the majority seem to have thought otherways. If then it be the ultimate decision of this Court, that a personal creditor adjudging is not exactly in his debtor's situation; it will follow, notwithstanding the loose expressions in the above case, that the heirs of entail are too late, that they might once have made their right effectual, but that others have now got the start of them, and carried off the estate.

Lord *Eskgrove*.—His Lordship said, that on looking into the Dictionary of Decisions, under the title *personal* and *real*, there are to be found many cases, from which it appears that an adjudger from a debtor under a back-bond, who had not made his right real by infestment, was subjected to the conditions of the back-bond; but it had been determined otherways, where infestment had been taken on the right. Before the cases mentioned in this question, his Lordship understood that a debtor having a personal right in lands, the first adjudication, or the first disposition, divested the debtor, and was effectual. But, afterwards that rule was altered, and rightly; and the attachment of the personal right came to be thought insufficient to give a preference, but the preference was given to the person who first completed his right by infestments. Why should a subsequent adjudger be in a better situation than a subsequent disponent? Where there are two disponees, and one goes on to complete his right by seisin, that one must be preferable, although the right which he holds be posterior in date to that of the other disponent. There is no reason why this should not hold equally in the case of adjudgers. The fact in Livingston's case was, that Gib stood debtor in a portion to his daughter, for which he granted an heritable bond to his son-in-law, and on that bond infestment followed. A creditor of the son-in-

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law adjudged the bond, and afterwards the father's lawful creditors adjudged the estate, and were infeft. They insisted in a reduction of the bond, on the act 1621, as granted to a conjunct and confident person. The defence for Livingston the adjudger of the bond was, that, supposing it to fall under the act 1621, that act cannot operate against onerous purchasers; and the case is the same with creditor-adjudgers. But the Lords said, that though a reduction on fraud be incompetent against onerous purchasers in heritable rights, yet creditors adjudging take the subject *tantum et tale* as it stands in their debtor, and are in so far different from disponees. Dirleton had stated this distinction a century before, and Stewart answers it as the Lord Justice Clerk has done in this case. This distinction alone gave rise to his Lordship's doubts on this question. But he was now clear on principle; and, from the decision on the case of Bell of Black-house, that the heirs of entail, had they taken seisin before the adjudgers, would have been preferred. Suppose the entailer had granted a deed, and the disponee had competed with the heirs of entail, the Court would have had no right to prefer the one to the other, until infeftment had been taken; and then the person first completing his right by infeftment would have been preferable. He had some difficulty at first, but he was clear now that when a debtor has several rights and titles in his person, although he may fix on which he pleases, his creditors may lay hold on that title which is most beneficial for themselves, unless the one had destroyed, and annihilated the other. But that is not the case here. It has been found, that the apparent heir of an investiture may possess in preference to a disponee, whose right remains personal; Sir Alexander Ogilvie against Sir Alexander Wright. And the heir apparent may enlist for a service, as heir to the last proprietor, though a disposition be produced to divert him, unless infeftment has followed on it: See the case of Sir James Suttie against Duke of Gordon, 1734; and this may serve as a strong example of the power of apparenacy. In that case, the impropriety of a service, when there was a disposition on which the other party would immediately take infeftment, was keenly argued: but the Court refused to listen to this plea. They said, the right is only personal, it cannot preclude the real right in the heir. Therefore the right of apparenacy is strong; and, if in this case there was a right of apparenacy, the creditors might charge the heir, and force him to take it up by a special service; and if they proceed to adjudge and take seisin, they have a good right. Therefore his Lordship was of opinion with the other judges, that the entail does not prevent a charge and adjudication; but only he demurred, whether an adjudger, who had not completed his adjudication by infeftment, could

could obtain a preference over the heirs of entail; his Lordship thought this could be done only by an investment.

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Lord Monboddo.—The act 1685 is the only regulator of entails. This act settled the requisites of an entail, and these requisites must be complied with, or the lands are not entailed against creditors or purchasers. His Lordship said he had learned this from a decision in the House of Peers; in that case there was an inconsiderable deviation from the act 1685, so small that this Court sustained the entail, but it was cut down in the House of Lords. He observed that this was the only case of the kind where there was an appeal, and that he had stood single against the decision of this Court. The act 1685 requires that the clauses irritant and resolute should be inserted in the investment, and so does the common law require that all burdens meant to affect the lands be inserted in the investment; therefore it is clear, that, as there was no investment on this entail, and the limitations consequently never were inserted in a seisin on record, the estate must be subject to the debts of the apparent heir of the investiture. It was said that he could not take up the estate, as apparent heir, but as heir of entail only. In the case of Douglas of Kilhead, the heir was taken bound to enter and possess on the entail, and so he could not possess on his appearance; but there was no such clause in this present entail. The heir might have made up his titles either on the investiture, or on the entail. Had he entered heir of the investiture, his Lordship is not clear whether the heirs of entail could have complained. But, be it as it will, there is a great and obvious distinction between this and Kilhead's case; the creditors were undoubtedly at liberty to charge Mr Ross to enter heir of the investiture; and, had he entered himself, he would have done a thing for which he was not blameable; he would have put the estate into the power of his creditors, a thing which he was more bound to do, than to carry his predecessor's intention into effect.

The Court found that the tailie was no bar to the sale. Judgement.

For the Charger, Ad. Rolland,	} Adv.	Ar. Swinton, C. S.	} Agents.
Suspender, Alex. Wight,		Ar. Crawford,	

Lord Swinton Ordinary.

Sinclair Clerk.

III.

III. WILLIAM GORDON, Esq; of Cambeltoun Pursuer,

AGAINST

DAVID M'CULLOCH, Esq; of Ardwall, Defender.

An entail disposes to himself, and to his son *nominatim*, and to the heirs-male of the body of the son, whom failing &c. : the prohibitions are directed against the son by name, but the irritancies are directed in general against the heirs of entail : It was found that the son must complete his titles by a service, and was to be held as an heir of entail, and, as such, bound by all the conditions of the deed.

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Edward M'Culloch of Ardwall executed an entail of his estate, which proceeds upon a narrative, that shows his intention to preserve the estate to a certain series of heirs. He disposes under the conditions of the deed, and under the irritant and resolute clauses thereof, "To myself, and to David M'Culloch, my only lawful son, and the heirs-male of his body, &c. ; which failing, to Elisabeth M'Culloch, my eldest lawful daughter, &c". ; and a long enumeration of substitutes is closed with these words, "But with and under the reservations, provisions, conditions, and clauses irritant and resolute, hereafter expressed." In the obligation to invest, the granter becomes bound to invest and seise himself, and the said David M'Culloch his lawful son, and his other heirs of tailie above mentioned ; and in the procuratory of resignation, David M'Culloch is mentioned amongst with the granter in the same manner. Notwithstanding the terms of the dispositive clause, the granter, in an after part of the deed, "reserves his own liferent of the said lands," with liberty to alter, to recall, or to sell, "without the consent of the issue of his own body or the heirs of entail."

The prohibition to alter the order of succession, and to sell or to burden the lands, &c. is directed against David M'Culloch, by name ; but the irritant and resolute clauses of the deed are directed in general against the heirs of tailie and provision. /

The granter of the entail died in the 1756, and was succeeded by David M'Culloch of Ardwall, then a minor. His titles were made up by a service, as heir of tailie and provision to his father ; in consequence of which, he obtained a charter from the crown, proceeding on the unexecuted procuratory of resignation contained in the deed of entail ; in which charter the whole irritant and resolute clauses of the entail were inserted.

David M'Culloch, after possessing the estate for a number of years upon this title, thought proper to execute certain heritable

ritable bonds and dispositions, in the view of burdening or alienating the estate; on which an action was brought, at the instance of W. Gordon, the nearest substitute, for having it declared, that all deeds executed by David M'Culloch to affect the said estate are void and null; and that the said David M'Culloch, although not specially named in the irritant and resolute clauses of the entail, is nevertheless bound by all the conditions and limitations of that deed.

Lord Stonefield, before whom the action came, ordered informations, and took the cause to report.

The defender has maintained that he is not an heir of entail, and that the irritant and resolute clauses of the deed being directed solely against the heirs of entail, he is not bound by them. Argument for the Pursuer.

In considering this defence, the pursuer might admit that the intention of the entailer, without words sufficiently binding, will not create an obligation on an heir of entail; for here the express words of the deed will be found, on a fair construction of them, to reach the defender. It is true, he is not named, but he is bound as one of the heirs of entail.

This is not the question, whether an institute can be bound by conditions directed in general against the heirs of entail; but, at any rate, the defender is not an institute, the estate is conveyed "to the granter, and to David M'Culloch his only lawful son, and the heirs-male of his body," and under this destination the fee was in the father, and not in the son, who was no more than a substitute.

The defender is called to the succession as an institute or disponent, and cannot be affected by any of the conditions of the tailie which are directed against the heirs of entail. By the terms of the destination, the defender, during his father's lifetime, might have taken up the estate by investiture, and he might have done the same after his father's death, without any service. Argument for the Defender.

If an estate be taken to two persons, and to the heirs of one of them, he to whose heirs the property descends is held to be the fiar. Here the estate is disposed to the granter, and David M'Culloch, and to the heirs of David; David therefore was the fiar. Besides, so much did the granter consider himself as divested of the fee, that he reserves his own liferent. The right of altering, &c. which was also reserved, is by no means inconsistent with the fee's being vested in the defender; nor would it hurt his plea that the granter were to be considered as joint fiar, seeing that in such a case he must still have entered by investiture, and not by service; Bankton, Vol. I. p. 658. § 6. and p. 576. § 116.; January 1731, Ballantyne.

Even

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IH.

Even heirs of entail have complete power over the lands unless they be expressly fettered; Ersk. B. HI. tit. 8. § 29. Dalrym. 77, July 22. 1712, Creditors of Riccarton; July 11. 1734, Bailie; Earl of Hopeton v. Hepburn, 1762, Falc. I. 116. II. 92.

AUTHORITIES.

Leslie's Case.

I. The first case is that of Lesly of Findroffe, decided in the 1752. The entailer disposed his estate to such persons as he should name, by a separate deed, and failing such nomination, to Alexander Lesly his eldest son, &c. The conditions of the deed were directed in general against the heirs of entail; and the Court found, that Alexander Lesly, being fiar, he is not liable to the irritancies contained in the entail.

Observation
for the Defen-
der.

The present case is more in favour of the defender, as the estate was disposed to him without any such suspensive condition as was imposed on Alexander Lesly.

Randiestone's
Case.

II. Catharine and Rachael Erskines, v. Mrs. Mary Balfour Hay; Fac. Col. 100. Balfour of Randiestone disposed for certain onerous causes, from him, his heirs &c. to James Balfour, and his heirs, &c. whom failing, certain other heirs, &c. In the procuratory and obligation to infest, the granter obliged himself to infest the said James Balfour, and the conditions of the deed are directed against the heirs of entail in general. James Balfour possessed under this deed, and after his death, a creditor of his pursued the next heir of entail for payment of a debt, whose defence was founded on the prohibitions of the deed under which James Balfour had possessed. The Court Feb, 14. 1758. found, "that James Balfour the granter of the bond pursued
"on was not restricted from contracting debts, he being dis-
"ponsee, and the restrictions lay on the heirs of entail only:
"therefore find the defender, who admits that he is heir of
"taille of the said James Balfour, liable in payment of the
"sums libelled."

Observation
for the Defen-
der.

This case the defender considers as in point; for, as he is a disponsee, and the conditions of the entail under which he possesses are directed against heirs of taille only, the principle established by the above decision ought to apply to him: the more so that his name, which appears in all the prohibitory clauses, is totally omitted in the irritant and resolute clauses.

Answer for the
Pursuer.

The difference betwixt the two cases is, that James Balfour was a disponsee, and completed his titles by infestment on the procuratory in the entail; the defender was an heir of entail, who completed his title by a service.

III. *Edmonstone v. Edmonstone*, Fac. Col. Nov. 24. 1769. C A S E
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The granter of the entail disponed to "Archibald Edmon-
stone, his eldest lawful son, and the heirs-male of his body, Duntreath's
Case.
whom failing, to Cambell Edmonstone," &c. under prohibi-
tory, irritant, and resolute clauses. The entail declared,
"that it shall be lawful to and in the power of the said heirs
of taillie to burden the estate" with a certain sum, which the
granter had provided for the younger children. The precept
is to seise the said Archibald Edmonstone and heirs above-nam-
ed, whom failing, the other heirs of taillie and provision above-
mentioned. The warrandice and assignation to the mails and
duties is to Archibald Edmonstone, and the other heirs of en-
tail. After the death of the entailer, Sir Archibald Edmon-
stone, the institute, brought a declarator for having it found
that he, as disponent and fiar, was not subject to the limitations
of the entail. It was argued by the opposing heirs, that, as
the pursuer was *nominatim* called an heir of entail, the condi-
tions and limitations which were directed against the heirs of
entail must affect him. But the Court "found, that in respect
it appears from several clauses in the entail executed by the
pursuer's father, that the pursuer is comprehended under
the description and designation of heir of entail, he is there-
fore subjected to the limitations and restrictions of the en-
tail." The house of Lords, however, upon an appeal, "or-
dered and adjudged that the interlocutors, &c. be reversed;
and it is hereby declared that the appellant, being fiar or dis-
ponent, and not an heir of taillie, ought not, by implication
from other parts of the deed of entail, to be construed with-
in the prohibitory, irritant, and resolute clauses laid only up-
on the heirs of taillie."

By this judgement of the House of Peers, the principle laid down in the two former cases was fully established; so that it is impossible, by implication, to extend prohibitory, irritant, or resolute clauses, directed only against heirs of entail, to the institute or disponent, or to make any of the conditions of the deed affect the institute, except by describing him either *nominatim*, or as institute. Observation
by the Defen-
der.

The judgement in this case is questioned; but, without entering into its merits, it may be observed, that, although in the dispositive clauses the obligation to infeft, and the assignation to the rents, &c. Archibald Edmonstone the institute is mentioned along with the other heirs; yet, in the restrictive clauses, his name is not introduced. Answer.

IV. *Menzies of Culdares*, Fac. Col. 27th June 1785. The Culdaire's entail proceeds in these words: "I nominate &c. James Men-
zies," Case.

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“ zies, my great-grandchild, eldest lawful son to Captain Archibald Menzies, and the heirs-male of his body, which failing, &c, (here there is a long substitution), to be my heirs of tailie and provision, and to succeed to me in the rights of the whole lands, &c; and, for their security thereanent, I hereby, with and under the express conditions, burdens, restrictions, reservations, and limitations above and under written, and failing of heirs-male of my own body, as said is, sell, analzie, and dispone, to the said Captain Archibald Menzies in life-rent, during all the days of his lifetime, for his life-rent use allenarly, the just and equal half of the rents and profits of my hail free estate, real and personal, above and after specified, in manner after expressed, and to the said James Menzies, my great grandchild, and the heirs of his body, which failing, &c. (the rest of the substitutes) heritably in fee.” The limitations and restrictions, as well as the resolute and iritant clauses of the entail, were directed against the heirs of tailie and provision.

James Menzies was served nearest and lawful heir of tailie and provision to the maker of the entail, and under that character he obtained a charter from the Crown. Upon this title he possessed this estate for a long period of years, and at last executed a supplementary entail, which having been called in question by the after heirs, the Court found, “ That an heir of entail, under the original entail, had no power to make the supplementary entail in question, but that James Menzies was not an heir of entail under the original deed, but a disponent, and therefore had powers to make such an entail.”

Observation by
the Defender.

In this case, James Menzies was expressly named as an heir of entail; yet, as he was held to be fiar, the conditions directed against the heirs of entail were found not to affect him; much more ought this to hold in the present case, where the defender is in no part of the deed either named or considered as an heir of entail. And, as the Court disregarded the service of James Menzies, on which he had possessed so long, no weight will be given to the service in this case, which was expedited through mistake during the minority of the defender.

Answer.

In Menzies's case, the prohibitions were not laid on James Menzies *nominatim*, as they were upon the defender in this case.

Livingstone's
Case.

V. Captain Livingston v. Lord Napier, Mar. 3. 1762 *. The
Countess

* As this case, which the judges, in delivering their opinions, thought a very important one, has not been collected, the circumstances of it have been given as they appear in the appeal cases.

Countess of Callander conveyed the lands of Westquarter in these terms: "To and in favour of the said Countess of Callander, and James Earl of Findlator, her husband, and the longest liver of them two in liferent and conjunct fee, and for the said Earl his liferent use allenary, and to James Livingston, third son to Alexander Livingston of Bedlermie, and the heirs-male to be lawfully procreated of his body; which failing, to such person or persons as the said Countess should nominate and appoint by a writing under her hand; and, failing of the said nomination, to the said James Livingston his own nearest lawful heirs and assignees whomsoever."

This deed contains all the usual clauses of a strict entail. At the time of granting it, the Countess had only a personal right; nor was there ever a full title completed in her person. On the death of the Countess, an infestment was taken in favour of James Livingston, proceeding on an unexecuted precept in a deed granted to the Countess, to which he had right in virtue of the assignation in the entail; and this infestment contained all the conditions of the entail. The father of James, besides taking the infestment in this form, put the entail on record during his minority. In the 1728, James Livingston resigned the estate in the hands of his superior, and obtained a charter, without any of the limitations of the tailie.

Mr Livingston sold the estate to different purchasers; and part of the estate came regularly into the hands of Lord Napier.

At the distance of 16 years from the death of James Livingston, an action was brought, at the instance of Captain William Livingston, brother of James who had obtained himself served heir of tailie and provision to the Countess, under the last substitution in favour of the nearest lawful heirs and assignees whomsoever of James Livingston. The object of this action, was to set aside the conveyance by James Livingston in favour of Lord Napier and his authors.

In this action the pursuer insisted that James Livingston had made up no title to the estate; that a service was necessary; and without it the infestment and subsequent charter were informal; or, if James was to be considered as having completed his title, he was bound by the terms of the entail, which had been inserted in his infestment in the 1706; and, in either case, that the deeds in question were null, and ought to be reduced.

The object of the defender, on the other hand, was to establish this point, that James Livingston, as fiar, had no occasion for a service, and that the charter and seisin in the 1728 were effectual. That the infestment in the 1706, which con-

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tained the limitations of the entail, was null, in the *first* place, as the precept of seisin had been erroneously copied into the instrument of seisin, the designation of the writer of the precept being "John Dick, servant to Alexander Cunningham;" whereas, in the instrument of seisin, it is John Dick, servant to Alexander Hamilton. *Secondly*, The procurator is said, at the commencement of the seisin, to be John Bryce; and, in a subsequent part, he is named John Burn. But these objections were founded on an extract of the seisin only, the principal having been lost. Were these objections sustained, then the only title, in the person of James Livingston, would be the charter and seisin 1728, and as these did not contain the conditions of the entail, they could not, in terms of the act 1685, militate against singular successors.

On the nature of James Livingston's right, and the title proper to be made up in his person, the defender maintained the following argument. It was manifest the Countess meant to vest the fee in James Livingston. He was joined with her in the fee, not substituted to take in succession to her: So the words import. The reserved power of burdening the estate, and altering the succession, would have been unnecessary, had she meant to retain the fee of the estate in her own person, but she meant to return it to the family from whom she received it. The settlement is to the Countess herself, and to James Livingston and the heirs-male of his body. Had it been to the Countess, and to the heirs of her body, whom failing, to James Livingston, then a service would have been necessary to ascertain the failure of the prior heirs. But, in this case, the fee of the estate being vested in him, no service was necessary. Or, even supposing that James Livingston was not joint heir of the estate, yet, as he was called as the first institute by name, the right devolved on him without any service, as had been found by repeated judgements in similar cases. The service of an heir, whether special or general, is no part of the heir's title to the estate, nor vests any right in him; it is only a cognition of the person's being the right heir. This is indisputably, the case of a special service and the same principle, must govern the general service, introduced by practice *ad exemplum* of the special service.

To this the pursuer answered: That the Countess, being absolute owner of the estate, James Livingston was chosen as her successor and heir; but there was no ground to presume that she meant to give him a conjunct fee in the estate. If this had been her intention, the proper clause would have been, "To the said Countess, and the said Earl her husband, and to the said James Livingston and longest liver of them three, for the said Earl his life rent use allenary." It was manifest therefore,

therefore, that James Livingston was not a joint fiar or dispo-
nee, but an heir of entail substituted by name, who was to take
the estate after her death ; that, consequently, the right could
not vest in him, without a service cognoscing him to be nearest
and lawful heir of entail and provision to the Countess under
that settlement.

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The judgement of the Court on this point was, " That, as March 3. 1762.
" by the tailies of the lands of Westquarter, executed by the
" Countess of Callander, James Livingston was called to the
" succession of the said lands, as heir substituted to the Coun-
" tess ; and, as the Countess's right to said lands (being a dis-
" position from Helen Livingston to her) remained at her death
" personal and incomplete, therefore that a general service
" was necessary to James Livingston, in order to carry the un-
" executed procuratory and precept in said disposition, and find
" that James Livingston's base infestment, &c. proceeding with-
" out the said general service, was ineffectual, and did not vest
" the lands of Westquarter in him." This judgement was ad-
hered to by the Court, and affirmed in the House of Peers on
the 11th March 1765.

The objections to the infestment 1706 were repelled. In
the course of the cause, the Court required the parties to give
in memorials on these points. 1st, That, as by the act 1685,
his Majesty's subjects are allowed to taillie their lands with ir-
ritant and resolute clauses, was the Countess of Callander en-
titled to entail the lands of Westquarter, in virtue of that act,
seeing she never was infest in the lands ? 2d, How far does the
act 1685 authorise the recording an entail in the register of
tailies, after the death of the granter, so as to be effectual a-
gainst purchasers and creditors ? On these points the Court
" Found that the Countess of Callander had power to make a
" taillie of the lands of Westquarter, in terms of the act of
" parliament 1685 ; and that the taillie made by her, having
" been recorded in the register of tailies, on the application
" of an heir substituted in the taillie, was effectual against sin-
" gular successors."

It is admitted in this case, that, had the destination been to Observation
the Countess and the Earl her husband, and James Livingston, by the Defen-
der.
and longest liver of them three, for the said Earl his liferent
use allendarly, James Livingston would have been a joint fiar :
But this is the very figure of words and expression which has
been made use of in this case ; the destination is " to myself
" and David McCulloch ;" therefore, according to the admis-
sion in that case, the defender is to be considered as fiar.

It is no doubt true, that, where an estate is disposed to two Answer.
or

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or more persons, and to the longest liver in fee, the longest liver, by the mere act of surviving, is necessarily the true fiar. If therefore the Countess of Callander had disposed the estate of Westquarter to herself and James Livingston, and the longest liver in fee, he, by surviving the Countess, would have been the fiar: But, in the present case, the settlement is altogether different; for Edward M'Culloch the petitioner's father disposed the estate of Ardwell, "to myself, and to David M'Culloch, my only lawful son, and the heirs-male of his body, and the heirs-male of their bodies," &c. The father therefore was the only fiar of the estate, and the defender was as much an heir as any of the after heirs.

Opinions. Lord Justice Clerk.—His Lordship expressed his approbation of the decision in the case of Edmonstone of Duntreath. Fetters of this kind are not to be imposed by implication. When extraordinary provisions are made, provisions which have the effect of taking land out of the circle of commerce altogether, they ought to be expressed in the clearest language, and so intelligible, that he who runs may read. They must give direct and clear information to the public, that they are not in safety to trust the person who has the estate. For these reasons, though it appeared pretty evident, in Edmonstone's case, that the entailer meant to fetter the institute, as well as any of the substitutes; yet, the House of Lords very properly found, that, as he was not expressly included, the fetters did not affect him. If in this case, as in that, David M'Culloch is truly a disponent; then, in conformity with the just principle established by that decision, he must be unfettered by the entail. But he is not a disponent, he is really an heir of entail; and so subject to all the conditions and limitations of the tailie. The grantor here disposes the property as well as the liferent use to himself. In moveables, a *nominatim* substitute might be regarded as an institute; but the law is very different with respect to landed property. If lands be once vested in the defunct, they must be taken out of his person by a deed, or service. Therefore, though here David M'Culloch be the *nominatim* substitute, yet, as the fee was in the father, it must remain in his *hereditas jacens* till David M'Culloch takes it out by a service. In the case of Lord Napier against Livingston, the estate was taken to the granter, and her husband in conjunct fee and liferent, and to James Livingston in fee, &c. James Livingston after the death of the granter, thought himself fiar. He infest himself on the deed, and sold the lands. A reduction of the sale was pursued by the substitutes, and the sale was found to be null, as no title had been made up by service. Now consistently with that decision, (which is a good one), David

vid M'Culloch must be regarded as a substitute. He must make up his titles by service. He is an heir of entail. And he is subject to all the prohibitions and irritant and resolute clauses of the deed alongst with the other substitutes.

Lord Swinton.—His Lordship was of the same opinion. The deed mentions David M'Culloch in the prohibitory clause; the irritant clause mentions only the heirs of tailzie; the resolute clause mentions the said "person or persons." Does not this include all that were mentioned before, and consequently David M'Culloch?

Lord Eskgrove.—Edmonstone's decision settled the rule of law clearly and well. The only question is, Whether this case be the same? There the tailzie was conceived to the son, reserving the liferent to the father: but there were expressions in other parts of the deed from which it was inferred that the son was included under the term of heir of entail; and accordingly the Court found that the conditions of the deed applied to him: but the House of Lords found him a disponent, and free from the prohibitions, &c. of the entail, which were directed against the heirs of entail only. This case is a different one: in the first place, as David M'Culloch is mentioned in the prohibitory clause; and, secondly, as the conveyance is to the disponent himself, and to David M'Culloch, &c. &c.; whereas, in Edmonstone's entail, the estate was conveyed directly to the son. What is the meaning of disposing to himself? There is no doubt a reserved power in an after clause: there was a similar one in Edmonstone's case; but the cases are different. In Edmonstone's case, there was a mere reserved liferent; here, there is a disposition to the granter, which was by no means necessary for constituting a liferent in him, if that alone was his intention. This disposition to himself is the same as if he had disposed to himself whom failing to David M'Culloch. These circumstances joined to the reserved power, (which explains the intention of disposing the whole property to himself, and of remaining complete proprietor of it), are sufficient to decide this case against David M'Culloch. In Edmonstone's case, the reserved power alone was not thought enough; but there the estate was disposed, not to the granter, but directly to the son. It is necessary for David M'Culloch, in the above circumstances, to have a service, in order to carry the estate out of the *heriditas jacens* of his father. Nay, here there really was a service. I should be sorry (if this arose merely from mistake) to lay hold of such a circumstance, to bind David M'Culloch; yet this service being so very soon after the settlement, shows at least the idea that was then entertained of the title. This case is, on the whole, infinitely stronger

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stronger than Duntreath's; and, under the title of heirs of tailzie, David M'Culloch must be included.

Lord *Monboddo*.—His Lordship approved of the decision of the House of Lords. So extraordinary a restraint as is imposed upon landed property by an entail is not to be imposed by implication.

Lord *President*.—The decision in the case of Lord Napier against Livingston decides the present. That case determined an important general question of law. I recollect the circumstances to have been exactly as stated by Lord Justice Clerk. *Ex figura verborum* there was a fee in James Livingston, and yet the fee was found to be truly in the granter, and her husband; and the right of succession only in Livingston: in the present case, *ex figura verborum* there is a fee in David M'Culloch; thus the cases are almost precisely similar; and the decision which was pronounced in Livingston's case, must regulate this. There is here a reserved power that no doubt is superfluous; but it is not sufficient to get the better of the real nature of the right created by the dispositive clause. A curious decision is reported by Stair, in the 1675, which it is believed would not be followed now*; a *nomination* substitute in moveables requires no service; but this is not the law in feudal subjects: with respect to lands, there is no doubt; and service is even necessary in heritable bonds, and in all other subjects constituted by feudal titles. Therefore, though in Lord Stair's case, the Court found the infestment equal to a service, we would now hold people in that situation merely as heirs, whose titles must be completed by service: indeed, the after decisions of the Court have always required services in such cases; which is sufficient to decide the present question. Here the prohibitory clauses are clearly effectual against David M'Culloch; and, though the irritancies should not be found to affect him, yet, as the prohibitions would found the substitutes in an action of damages against him, it is to be feared that freeing him from the irritant and resolute clauses would give him but little ease. No regard is to be paid to the service as precluding him from his right. Such a circumstance was not regarded in Culdare's case.

The

* His Lordship probably alluded to the case of the Laird of Lamington against Moor, decided 23d July 1675. A bond was taken to a father; and, failing him, to his two sons by name; and failing one of them, to the survivor; in which terms they were infest. The Court found that the two sons were but heirs substituted; yet their infestment did supply the necessity of a service as heir.

The Court "found and declared in terms of the conclusions of the original process of declarator at the instance of William Gordon."

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This Judgment was adhered to on advising a reclaiming petition for the defender with answers.

Judgment 24
Feb. 1791.

For the Pursuer, Abercrombie, Geo. Ferguson, } Adv. J. Gordon C. S. } A.
Defender, Dean of Fac. D. Cathcart, } C. Stewart C. S. }

Lord Stonefield Ordinary, Menzies, Clerk.
Vol. II. No 12.

IV. SIR CHARLES PRESTON of Valeyfield, and others, trustees appointed by Robert Wellwood, Esq; of Garvock Pursuers;

A G A I N S T

Robert Wellwood, Esq; of Garvock, and others, Defenders.

An entailer having disposed to himself, "for his liferent use only, during all the days of his lifetime, and failing him by decease, to his nephew; and the conditions of the entail being directed against the heirs of entail only, the nephew is held to be institute, and so not affected by the conditions.

Henry Wellwood, with a view to continue his estate of Garvock in his family, executed a bond of taillic, by which he bound himself, and his heirs of every description, "to make due and lawful resignation of his estate in the hands of his immediate lawful superiors of the same, in favours and for new infestment thereof, to be made, &c. to myself in liferent, for my liferent use only, during all the days of my lifetime, and failing of me by decease, to my heirs of taillic and provision aftermentioned, with and under the several provisions, conditions, &c." the destination and course of succession are thus stated in the procuratory of resignation: "In favours and for new infestment to be made, &c. to me, the said Henry Wellwood in liferent, for my liferent use only, during all the days of my lifetime, and failing of me by decease, to Mr Robert Wellwood, advocate, my nephew, and the heirs-male of his body; whom failing, to Robert Wellwood, my brother german; and so on, through a considerable course of substitutes.

This entail contained prohibitory, irritant, and resolute clauses, directed against the heirs of entail.

Robert

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Robert Wellwood, on the footing of his being *nominatim* disponee institute and fiar of the estate, and not an heir of entail of the said Henry Wellwood, brought an action for having it declared that he was unlimited proprietor of the estate, and entitled to dispose of it at pleasure. And having under that character, executed a disposition in favour of trustees, the action on his death was carried on at their instance, which being conjoined with a counter action at the instance of Robert Wellwood and the other heirs of entail, the Lord Justice Clerk, before whom they came, took the cause to report on informations. The point at issue was, whether Robert Wellwood was to be considered as an heir of entail, and of course bound by the conditions of the deed.

Argument for
the Pursuer.

It is a clear proportion, that, under the conception of the bond of taillie, the pursuer is appointed institute or disponee of the granter in the fee of the estate. The granter of the deed had nothing more remaining in him than a liferent by reservation.

The pursuer was not the nearest heir of the granter, and the deed was immediately rendered a delivered evident by registration. Under these circumstances, there is no principle of law from which it can be inferred that the fee remained in the granter. Even in the case of a deed executed by a father in favour of his son, the son would take as disponee, not as heir; for it is only in consequence of the maxim in law, that a fee cannot be *in pendente*, that a destination to a father in liferent, and to children *nascituri* in fee, renders the father constructive fiar. But, where the fee is given to the son *nominatim*, the fee is in him. It is true, this fee may be defeasible, and the presumptions in favour of the father's reserved power are strong; and cases may be put, where, notwithstanding of such a fee, the substantial interest of the estate remained in the father, and the fee of the son might be defeated or impaired by the deeds of the father. But still this right of fee in the son, if not defeated by the father, carries the full right and property of the estate. Thus, if a father convey to the son, reserving his own liferent and a power to alter, but dies without exercising this power, the son takes up the estate, as disponee, the reserved interest of the father has not the effect of rendering it necessary for the son to complete his titles by a service.

But, in the present case, where the deed is granted not to the heir *alioqui successurus*, there cannot be a doubt that the fee was conveyed to the pursuer, and that nothing more than a liferent, by reservation, remained in the granter; and it was impossible that the pursuer could have made up his titles by a service. He was neither heir of line nor of provision to the granter

granter, there was no fee in the granter descendible to him as heir of provision. He was disponee, and the heirs were heirs of tailie and provision to him, not to the granter.

If the pursuer be right, it requires to be considered whether he is affected by the prohibitions and irritancies of the entail; and this point of law is now settled, beyond all question, by a series of decisions, both of the Court of Session and of the Court of the last resort, pronounced with deliberation, in important cases, and founded on the soundest principles of law.

The principles of these decisions are, 1st, That the fetters on property created by entail are not effectual at common law, but depend on positive statute; 2d, That, accordingly, deeds of entail, in so far as they impose these restrictions, are of the strictest interpretation. Hence, though the question arise *inter heredes*, if the point in dispute is, whether a restraint is created or not created, courts of justice have no room for any latitude of interpretation. Unless the granter has directly and technically imposed fetters, they will not be sustained, altho' the intention of creating them might be gathered from the deed.

Cases referred to Leslie of Findrossie, 24th July, 1752; Balfour of Randiestone, 14th Feb. 1758; Edmonstone of Duntreath, 24th November 1769; Menzies of Culdares, 25th June 1785. Besides these, reference was made to the case of Roughhead of Inverleith, lately decided on the same principles, and affirmed, in the House of Peers.

In answer to the argument for the defender, founded on the deeds, and conduct of the pursuer, which implied an admission of his being bound by the limitations of the entail, it was observed for the pursuer, that his opinion of his right does by no means alter the nature of his right; and of this there was a complete proof in the case of Menzies of Culdares, where, although his additional entail went on the belief that he was bound by the conditions of the original entail, yet the Court found that he was not an heir of entail, nor bound by the limitations of the original deed.

The maker of the entail was at liberty to transmit his estate to whom and in what form he pleased; and, as it is an established rule, *uti quisque de re sua legasset, ita jus esto*, one would naturally imagine that the pursuer's right ought to depend entirely on what shall appear from the entail to have been the intention of the maker thereof. Argument for
the Defender.

The motive of granting the entail, namely, the continuing the estate in the family of the granter, show sufficiently his intention; and it further appears from solemn deeds, which both he and the pursuer entered into, that their opinion was,

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that Robert Wellwood was bound by the conditions of the entail.

Entails will not be extended *de causa in causam*; and settlements, as they often tie up the heir in one particular, and leave him intentionally free in others, a Court will not extend the limitations beyond the words of the deed; but, when the maker of an entail sets out with declaring it to be his object to continue his estate in his family, and when he provides that none of the heirs shall have it in their power to frustrate his intention, it is impossible to suppose that he meant an exemption in favour of the pursuer, whom he first calls to the succession.

The defenders have laid great weight on the case of Edmonstone of Duntreath. But the defenders apprehend that there is a specialty in the present case. There the estate was disposed to Archibald Edmonstone his eldest son, and the heirs-male of his body; whom failing, to Campbell Edmonstone, his said son, &c. with a reservation of the granter's liferent, and a power to alter. Of course, the fee, though liable to revocation, was immediately in Archibald Edmonstone who might have completed his title by investiture. The present case is very different; for, although, *ex figura verborum*, the maker of the entail became bound to resign the lands for new investiture to himself in liferent, for his liferent use only, yet he by no means vested the fee in his nephew; on the contrary, the fee was established in him only, upon the decease of the entailer. The words are, "To me, for my liferent use only, during all the days of my lifetime, and failing of me by decease to Mr Robert Wellwood," &c: So that Robert Wellwood can be considered in no other light than as an heir of entail, who must have completed his title by service.

It is an established point, that an estate provided by a father in his son's contract of marriage, to his son in liferent, and the children of the marriage in fee, the son, though *ex figura verborum*, only a liferenter, is truly heir. Children of Frogg against his creditors, 1736; Lilly v. Riddle, February 24. 1741. a fee cannot be *in pendente*.

Nor has this principle been confined to the case of landed estates; it was recognised in the conveyance of a bond, Graham's tutors against Graham, 23d June 1779, and afterwards affirmed in the House of Lords.

The present case is somewhat different from them; but it is regulated by the same principle. Robert Wellwood was only called to the succession on the death of the granter, therefore he could have no present interest in the estate. The granter, though, *ex figura verborum*, a liferenter was in truth heir, and hence Robert Wellwood must fall under the description of heir of entail.

The

The cases put by the pursuer do not apply, because they all suppose conveyance, with a reservation of the granter's liferent; whereas, in this case, the distinction is to the granter, though nominally in liferent, yet substantially in fee.

It has been said that Mr Robert Wellwood could not have completed his title by a service, as there was no fee in the granter descendible to him as heir of provision; but this is a *petitio principii*; for, if it be supposed that the fee was in the granter, Robert Wellwood could have made up titles in no other way than by a service.

Suppose Robert Wellwood, the defender's father, to have predeceased the entailer, in what manner could the defender have completed his title, had he attempted to acquire right to the unexecuted procuratory, by a general service? It would have proved a bar, that his father, during the lifetime of the entailer, had no interest which could be carried by a service, and the defender must have served as heir of entail to the granter, as the person last vested in the fee. It necessarily follows, that Robert Wellwood must have completed his title by a service.

If these observations be well founded, they put an end to the question, for they prove that Robert Wellwood did not make up a proper title to the estate, and of course none of his acts and deeds can be effectual.

The cause was reported by the Lord Justice Clerk.

Lord *Eskgrove*.—This case is different from the last *. Iri- Opinions.
tention is not sufficient. I observed, in the former case, that the granter's disposing to himself, constituted a fee in his own person; but here it is "for his liferent use only, during all the days of his lifetime, and failing him by decease, to Robert his nephew," &c. This entail is different also in the reserved powers; it concludes with renouncing all power of alteration, and declaring the deed to be in full satisfaction to Robert of all claims, &c. On this settlement a charter might have been expedite *de plano* to the granter in liferent, and Robert in fee: It was not conceived to Robert on the death of the granter, and his heirs, but disposed directly to him: and therefore there was no occasion for a service to complete his title. Liferents by reservation, although they sometimes are held to be fees, yet, where they are expressed to be for liferent use alienably, the same interpretation will not be given; they will always be held pure liferents, and incapable of giving any right more substantial. A fee cannot be *in pendente*; therefore,

* This question was decided on the same day, and immediately after Case III. Gordon against M'Culloch.

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therefore, when a father reserves a liferent in his marriage contract, as there are no heirs in existence, the liferent is rightly construed to be a fee in the father; but the expression in the case is much too strong to admit of this interpretation: It is to be held a mere right of liferent: This is confirmed by the reservation of powers to set tacks in particular cases, (all other powers are renounced); so that here Robert is to be considered as a direct disponent, who does not need a service: And, as all the prohibitory, irritant, and resolute clauses, are directed only against the heirs of entail, he cannot, consistently with the decision in Edmonstone's case, be subjected to them.

Lord Menzies.—His Lordship agreed in the opinion delivered by Lord Eskgrove.

Lord Swinton.—Had difficulty in forming an opinion upon this case, from the expression, "and failing him by death." The case was, in other respects, his Lordship thought, similar to Duntreath's.

Lord President.—The Court will always support Duntreath's decision. If this case be the same, it is decided; the only difficulty here arises from a doubt where the fee lies. This is a very nice question. His Lordship said, he wished to make this gentleman free. It is fair to wish so; it is a wish which the law approves of. But he was not clear whether he could, on grounds of law, gratify that wish. This difficulty was founded on the clause hinted at by Lord Swinton. It is a rule well fixed in law, that a fee cannot be *in pendente*; it must either be in the granter or in the disponent. This is illustrated by the first words of the settlement, "In favour and for new" "infeftment to be made, given, and granted to myself in life-
"rent, for my liferent use only, during all the days of my
"lifetime, and failing of me by decease to my heirs of tailie
"and provision" &c. Here there is no heir named; and it would seem, that though, in this case, *ex figura verborum*, the granter has merely a liferent, it will in law be construed to be a fee. Perhaps the fee would be only fiduciary; but, although these words, "for liferent use alienably," would no doubt make it merely a fiduciary fee, yet it would be a fee. It does not signify whether it be a simple fee, or otherways; it is a fee in that person: for the fee must rest some where, and can in such case rest only in the granter. To a person thus holding the fee, the heir must make up a title by service. Suppose, then, that no name had been mentioned at all, Robert Wellwood must have served heir, and all the clauses of the tailie would have applied to him: What then is the difference produced by the words in the depositive clause? They are "to me the said
"Henry Wellwood in liferent, for my liferent use alienably
"during all the days of my lifetime; and failing of me by de-
"cease,

"cease, to Robert Wellwood my nephew," &c. If these unfortunate words, "and failing me by decease," which have been the source of so many disputes, had not occurred in this deed, there could have been no question Lord Eskgrove's opinion, that a charter might have been expedite to Henry in life, and to Robert in fee, must in that case have been adopted. But these words must have the effect, (if such a thing were possible), of keeping the fee *in pendente*. As this is impossible, they must at least keep the fee from vesting in Robert, till Henry's death. The fee must therefore rest with the grantor. He ties up his lands; it is true, he makes himself a fiduciary fiar; but, if he be a fiar at all, Robert must enter by service; and this, *eo ipso*, makes him an heir. In the first clause of the disposition the words run thus, "to myself in life, &c. and failing him by decease to the heirs after mentioned." This surely includes Robert; but it would be wrong to catch him by this expression, if there were real grounds for supposing that there was a fee in his person. On the whole, there must necessarily be a service, and the person who serves must, as heir of entail, be included under all its prohibitions. There is a decision in the Dictionary, page 367, where the lands were taken to one, and failing by death to the eldest son: But that case was different from this; for there no life was mentioned. And the only question remaining is, whether does the mention of life alienably do more than make it a fiduciary fee?

Lord Henderland.—His Lordship thought that the expression "failing by death" made this man an heir of entail as much as any of the substitutes brought in by a "whom failing."

Lord Justice Clerk.—This is a nice question; there is here a settlement of the whole estate, the whole of it, life, fee, &c. is taken up by the tailie, and the only question is, Where is the fee? Though a father settling his estate in his marriage contract takes it to himself in life, and the children of the marriage in fee, the father is construed to be the fiar. And there is a good reason for it; 1st, Because the fee cannot be *in pendente*, and therefore must vest in him; since there is no other in whom it can vest. 2dly, Because there is a natural presumption, that a father, though he intends to settle his estate on his child, means to retain the full property of it until his death. This has been decided often. But, suppose the estate is taken to himself in life, "for his life use only," he in that case reserves no earthly power over the estate. He enjoys the rents, it is true; but he can exercise no right, except that of a mere liferenter. His creditors are not entitled to carry it off. It may be said that there is no child, that no body has an interest, and that the fee cannot be *in pendente*; and

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and it is very true, that, though entitled only to the liferent, as there is no heir existing, the father has the fee. But it is a mere caducuary fee, falling to the heir of the marriage on his existence. The creditors of the father are not entitled to affect the estate, but merely the liferent. Here there is no such necessity. The heir is existing; he is called *nominatim ex voluntate testatoris*. There is here then no necessity for making the fee remain with the granter: He expressly declares that he renounces all the powers of a fiar: There is a pure fee in Robert. The words, "and failing me by decease," means merely that Robert is not to exercise his right till the granter's death. It was asked, How titles would have been made up if Robert had died? To say they would have been made up to the granter, is a mere *petitio principii*. They would certainly have been made up to Robert, for he had the fee: The case put by the Lord President is different from the present. It is the same with a marriage-settlement, where the fee, *ex necessitate*, must be in the granter; but here there is no such necessity, where the disposition is to the father in liferent "for his liferent use allenary," and to the son in fee. If the son serve heir of provision, he will no doubt be liable, in that character, for the debts of the father; but he is not obliged to do so. The father, in such a case, would be merely the trustee for his son; and a truster is not obliged to serve to a trustee. He has a *jus crediti* under the right. The heir, on his existence, may bring an action of declarator of trust against the father, for having him declared to be mere trustee; and the titles might be made up in this way. He is not obliged to serve, for the fee is in himself. In this case, Robert might have brought an action against the brother of Henry Wellwood, the lineal heir, to denude him of the estate. But there is no occasion to enter into these cases; for here the fee cannot be with the granter, who has reserved only a mere liferent. It must vest in the person of Robert Wellwood.

Lord Dregburn.—His Lordship said, that nothing can be clearer than the expression, "for liferent use only." but the difficulty here is, that it is followed by expressions directly opposite.

State of the vote, Repell or sustain the defence. Lords Justice Clerk, Gardenston, Eskgrove, Swinton, Rockville, Monboddie, Dunfinnan and Dregburn, voted repell; Lord's Stonefield and Henderland, voted sustain.

Judgement. Decree was accordingly pronounced in favour of the pursuers.

For the Pursuers, Allan M'Conochie,	} Adv.	Lau. Hill,	} Agents.
Defenders, Alex. Wight,		Tho. Adair,	
Lord Justice Clerk Ordinary.		Home Clerk	

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entail; they might have brought an accendachie to complete his titles under the as not done, and as, from the 1740 down- possession upon unlimited titles, prescrip- the heirs. As to the interruptions, Au- cannot be deduced, for it was not against our, that prescription was running. His deaded against himself. But his sister was on was fully considered in M'Dowal's case, ruption by the minority of successive heirs n this principle, that there is a *jus crediti*. Were it otherwise, there would be an such cases; for there are minorities in son of some substitute or other. The to this opinion, that the minority of nly was to be deduced.

ordship asked whether there could

tion was argued in the question, July 1756. It was thought in ht in a substitute to found on te substitutes, since, in all cas- ted stops the course of pre- it was found that a substitute the intermediate substitutes. opinion prevailed; for, as the 40 years, during all which d the entail, though not to r Lordships held that he could e preceding heirs of entail. It rity of the first substitute must ars of prescription. His Lord- this case here, that the sister was arer substitute than her brother,

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tory of resignation contained in that deed. On that title, he possessed down to the 1768, when the superior, having obtained a decree of declarator of nonentry against him, Auchindachie took a charter, confirming the disposition by Mr Duff to his father, and containing a precept of *clere constat* for infest-ing himself in the lands, as heir-male and of provision to his father. Upon this precept no infestment ever followed.

Auchindachie's affairs went into disorder; his creditors led adjudications against his estate, and afterwards brought it to a judicial sale. It was purchased by Mr Byres; when a process of reduction was raised at the instance of Auchindachie, and of Sarah his sister, the next substitute in the entail.

The grounds of this reduction were, 1st, That the adjudications had been improperly led; and they being the grounds upon which the sale had proceeded, the sale must be void. (The arguments upon this objection, and the judgment of the Court upon it, will be found in case V. of Adjudications.) 2d, That, by the contract of marriage 1738, the lands of Kincraigie are disposed to the heirs-male, whom failing, to the heirs-female of the marriage, under the conditions of a strict entail: and, as no infestment ever followed upon the foresaid contract, either in the person of the present Auchindachie, or of his father, his right is to this day personal, and, as such, must be taken with all its qualities; consequently, this entail, though not recorded in terms of the act 1685, operates a nullity of all debts and deeds of the present Auchindachie; and, therefore, that Sarah Auchindachie, the next substitute, is entitled, under the entail, to take up the succession of the said tailied estate, in consequence of Auchindachie's acts of contravention; and that she has a *jus quasitum* to challenge any irregular alienation of the *hereditas jacens* of the father, and also to insist that it shall be relieved of the debts of the contravening person.

This action of reduction was dismissed, upon the footing that no title to pursue had been produced; but, as that might have been remedied, and the parties subjected to a new action, a suspension was presented for the purchaser and cautioners, and a reduction brought of the decree pronounced in the former reduction. Thus, the question betwixt the purchaser and creditors came to be, whether the sale could be reduced by the heirs of entail in virtue of the tailie contained in the contract of marriage. On the part of the creditors, it was maintained, that the tailie had been cut off by prescription; and, upon this point, the Court ordered a hearing in presence. When this cause was advised, the following opinions were delivered.

Lord Justice Clerk.—This entail was made in the 1738, and the granter died in the 1740. Upon his death, a *jus creditum* vested



vested in every heir of entail ; they might have brought an action for forcing Auchindachie to complete his titles under the entail ; but, as this was not done, and as, from the 1740 downwards, there has been possession upon unlimited titles, prescription has run against the heirs. As to the interruptions, Auchindachie's minority cannot be deduced, for it was not against him, but in his favour, that prescription was running. His minority cannot be pleaded against himself. But his sister was minor. This question was fully considered in M^cDowal's case, and the plea of interruption by the minority of successive heirs of entail overruled, on this principle, that there is a *jus crediti* in every heir of entail. Were it otherwise, there would be an end to prescription in such cases ; for there are minorities in every entail, in the person of some substitute or other. The Court, therefore, came to this opinion, that the minority of the immediate substitute only was to be deduced.

Lord *Monboddo*.—His Lordship asked whether there could be a different opinion ?

Lord *Esqgrove*.—This question was argued in the question, *Ayton v. Monnypenny*, 31st July 1756. It was thought in this Court, that there was a right in a substitute to found on the minority of all the intermediate substitutes, since, in all cases, the minority of parties interested stops the course of prescription ; and, on that ground, it was found that a substitute might plead on the minority of the intermediate substitutes. In the House of Lords a better opinion prevailed ; for, as the pursuer was major for more than 40 years, during all which time he had a right to have saved the entail, though not to take possession of the estate, their Lordships held that he could not found on the minority of the preceding heirs of entail. It was not doubted that the minority of the first substitute must form a deduction from the years of prescription. His Lordship laid his only difficulty in this case here, that the sister was minor, and there was no nearer substitute than her brother, who was acquiring the immunity.

Lord *President*.—The doctrine mentioned in all the cases (*Rippoch, Whitbys, Panmures, &c.*) was, that the minorities of remoter substitutes are not to be listened to as a plea of interruption ; for such minorities always were to be found in entailed succession ; and to sustain this plea would be to take away the law of prescription from such cases. The heirs of entail were considered as a collective body ; the prescription against them is similar to that against a corporation, some one of which is of age to represent the whole. The point was well considered in *Whitby's* case. John Alexander Gordon pleaded on his own minority, but it was overruled. Here it is said that there is no positive prescription, but negative alone. This

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is not to be understood. Porterfield's case is in point; where an entail had been latent for 40 years and then produced; the right to enforce it was found to have been lost by the negative prescription. The same in Lockhart of Lee's case, where an English trust was in question.

Judgement,
Jan. 31. 1792.

"The Lords having resumed the consideration of this petition, with the whole process, and heard parties procurators in their own presence thereon, they find that the tailie contained in the late George Auchindachie's contract of marriage is cut off by prescription."

For the chargers, J. Wolf Murray, } Adv. W. Gordon, C. S. }
suspensers, George Ferguson, } A. Grant, C. S. } A.

Lord Swinton, Ordinary. Menzies Clerk.

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VI. WILLIAM REDHEAD, Tenant in Chatto, Pursuer;

AGAINST

ROBERT KERR of Chatto, Defender.

An heir of entail bound not to grant a lease of longer duration than 19 years, having granted a lease for that term to commence at the expiry of a lease then current, and of which there was three years to run, and dying six months before the commencement of the new lease, it was sustained for 19 years from the date of the agreement.

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Alexander Kerr held the estate of Chatto under an entail, which declares, "that it shall not be lawful to the heirs succeeding to the estate to alter the order of succession hereby settled, nor set tacks for a longer time than the setter's lifetime, or for nineteen years, and for a less tack-duty than at the time of his succession, at least for a tack duty less than the value, to be ascertained before a judge." William Redhead possessed the farm of Over Chatto, part of this estate, on a conveyance to a lease which commenced in the 1753, and was to expire at Whitsunday 1791. Redhead was bound to pay yearly a rent of L. 345:16:7 Sterling, to the principal tacksmen, who paid to the proprietor only L. 177 Sterling; but the principal

principal tacksmen, from thinking that it was overrated, gave him a deduction, which reduced the rent to L. 338:6:7.

In the 1788, an agreement was entered into betwixt Mr Kerr, the heir of entail then in possession, and Redhead, by which Redhead was to receive a new lease from Mr Kerr for 19 years, to commence at the expiration of the old lease, at the yearly rent of L. 345 Sterling: But Mr Kerr was to allow L. 100 for repairs of houses &c, on account of the tenant's waving all privilege to plough contained in the old tack; and another L. 100 was to be given for making stells and other improvements on the farm. This agreement wanted the solemnities necessary to give it effect as a deed, but it was signed by the parties, and was immediately afterwards put into the hands of Mr Kerr's man of business, for the purpose of making out a regular lease; before that was done, however, Mr Kerr joined his regiment, and died abroad in November 1790.

Mr Kerr was succeeded by his brother Robert Kerr, and he having brought a removing against Redhead, and Redhead on the other hand an action for forcing Robert to implement the agreement of his brother, the two actions were conjoined; and Lord Dreghorn, before whom they came, decerned in the removing against the tenant, and affoizled the heir of entail from the action for fulfilling Alexander's obligation.

By the original lease, the tenant had a right to plough to a certain extent during the last years of the lease. In consequence of the new agreement, however, he did not plough to that extent, and, with a view to his future possession, he repaired the houses, and made inclosures on the farm, which cost him L. 400 Sterling. But it is unnecessary to go minutely into these circumstances. The point which ultimately came to be considered was this; as the heir of entail was prohibited from selling leases for a longer period than for 19 years, and as he died before the commencement of the lease in question, whether was it binding on the next heir of entail? On this point the following argument was maintained.

In the *first* place, although nominally the petitioner's possession under the new lease was to commence only at Whitsunday 1791, when the old lease was to expire, yet *de facto* he possessed under the agreement from the day of its date, having in consequence thereof altered his mode of culture, and managed the farm under certain restrictions thereby imposed. The tenant is therefore entitled to a *tack* for the period of at least 19 years from Whitsunday 1788; nor can the heir of entail object to this on account of the low rent prior to crop 1791, as these rents do not belong to the present heir, but to the executor of the last heir of entail.

Argument for
the Tenant,

The

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The tenant may admit that an heir of entail, bound not to grant a lease for a longer period than 19 years, may nevertheless at liberty to grant a lease for that term, with an obligation to renew the lease for other 19 years upon its expiry; while he at the same time maintains, that, when a tack is, within a few years of expiry, an heir may *bona fide* become bound to grant to the tenant in possession a new lease at a higher rent, to commence at the expiry of the old one, and that the death of the heir of entail before the commencement of the new lease will not destroy the right of the tenant. A contrary doctrine would often have the effect of hurting the farms, as the tenants could have no certainty that they were not to be removed, and might then be induced to run them out; and, if it be said that this bad effect may be avoided by the tenant's renouncing his old, and taking a new lease, then it comes precisely to the demand which the tenant makes, when he insists that his lease shall commence from the date of the agreement with the heir of entail.

This point was fixed by the decision in the case of Campbell of Blythwood v. John Love, July 14th, 1772.

James Campbell possessed the lands of Blythwood under an entail, which contained a regulation with regard to setting leases similar to the present. Love, the tenant in a farm on the estate, held a lease which expired at Candlemas 1770; upon the 6th March 1766, when there was near four years of the lease to run, Blythwood entered into a new lease with the tenant, by which he set to him the lands for 19 years from Candlemas 1770, at an advanced rent. Blythwood died in the 1767, without issue; and the next heir of entail, on the tenant's not removing at Candlemas 1770, brought an action against him for having him removed at Candlemas 1771. The sheriff, before whom the question originally came, found that the tenant, in virtue of the tack dated 6th March 1766, had right to possess the lands for 19 years from the date of the tack; and this judgement was adhered to by the Court, before whom the question came by advocacy.

The only difference betwixt that case and this is, that there the granter died three years prior to the expiry of the old lease; here the granter lived till within six months of the expiry of the old one, leaving, in fact, no more than a nineteen years lease from the time of his death upon the subsequent heir: and that in Blythwood's case the tenant had not, on the faith of the lease, expended any money, nor acted under any restraint in the management of the farm, during the currency of that lease.

Argument for
the heir of entail.

Where an heir of entail comes under an obligation to grant a lease, although the granting of that lease be an act within his power;

power; yet, unless possession has followed on the obligation during the life of the granter, the next heir of entail will not be bound to carry it into effect, unless he represents the preceding heir in some separate estate; and a contrary doctrine would be subversive of entails altogether, as obligations of this kind might be made to succeed one another for any period of time. Neither are such obligations good against singular successors; Durie, Hunter against tenants, 16th December 1629, and Lesly against Orme, 2d March 1779; where a lease for an additional 19 years, after the expiry of a long lease then current, was reduced: And this principle is sufficiently obvious from the nature of leases; Ersk. B. II. tit. 2. § 23. § 25; and Craig, B. 2. tit. 16. § 11.

The memorandum in this case was not followed by possession during the lifetime of the granter; and it is to no purpose to say that the petitioner might have renounced his lease, and taken possession under the memorandum; *quod potuit non fecit*: the memorandum remained a personal obligation during the lifetime of the granter. It cannot, therefore, be effectual against the present heir of entail, who in no shape represents the preceding heir. In Campbell of Blythwood's case, there were acts of homologation, and there was a formal lease, in place of an improbativ memorandum.

Lord President.—His Lordship said it was a material circumstance that Redhead, in consequence of his new lease, had altered the plan of his operations. Opinions.

Lord Eskgrove.—Admitting that the lease had been entered into in the most formal manner, it did not commence till after the death of the granter; and the question is, Can it take effect against the next heir of entail? In the case Lord Kinaird v. Hunter, the Court were of opinion that prorogations of a lease were not effectual which did not commence during the lifetime of the granter of the prorogation. I confess, then, that my difficulty arises from possession not having followed on the new lease during the lifetime of the granter.

Lord Swinton.—Thought that this difficulty was overcome by considering the alteration on the mode of managing the farm as a possession under the new lease.

Lord Justice Clerk.—His Lordship mentioned the case of Campbell of Blythwood. It is a general rule, that possession must commence upon a lease during the lifetime of the granter, in order that the lease should affect the next heir of entail: But his Lordship doubted how far that could be applied to this case. It is true, that no heir of entail, under such fetters as the present, can give a nineteen years lease, to commence at the expiry of a current one; but, were this rule rigorously adhered

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adhered to, what must happen? The outgoing tenant, uncertain that he will be allowed to continue in his possession, runs out the lands. Therefore, it would be attended with good consequences, were an heir of entail possessed of a power to renew a lease a few years before the expiry of the old one: At the same time, this should never authorise an heir of entail to go beyond common acts of administration. A lease, executed 12 years before the expiry of a current one, and the grantor dying before possession had followed on the new one, the new one could not receive effect: But the reasoning upon which that would be found does not apply to the present case.

Lord President.—His Lordship said, he did not recollect the case of Lord Kinnaird v. Hunter; but he was acquainted with the case of Campbell of Blythwood v. Love. Two or three years of the old lease were to run; but, as the renewal of the lease was nothing more than a common act of administration, the Court sustained the lease, cutting off only the three years necessary for reducing its duration to the extent authorised by the entail; and I cannot see any good reason for distinguishing that case from the present.

Lord Eskgrove.—Then your Lordship would make this lease commence from the date of the agreement.

Lord President.—Certainly.

Judgement.
June 19 1792.

“The Lords having advised this petition, they alter the interlocutor reclaimed against; find the petitioner (Redhead) intitled to a lease of the farm of Over-Chatto for the space of 19 years, from and after the term of Whitsunday 1788, conform to the agreement libelled on.”

This judgement was adhered to; and a third reclaiming petition was presented, on this ground, that, in the former papers, the matter had been argued as if Redhead had held a right to the old lease, and had been enabled to renounce the lease; but, by recovering the conveyance, which was unsigned, it appeared that he had no such right, and consequently this case was very materially different from the case of Campbell of Blythwood, where there was a presumed renunciation of the former lease; which, in the present case, could not possibly be presumed; and on this fact, which was said to be one *noviter veniens ad notitiam*, an alteration of the judgement was craved; upon advising this petition the following opinions were delivered.

Lord President.—The conveyance to this sub-lease, had it been formerly recovered and produced, would have made no change in my opinion; nor did your Lordships, in deciding this case, proceed on the grounds which regulated the case of Campbell

Campbell of Blythwood, but on this ground that you did no injustice to the heir of entail in possession.

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Lord *Seaton*.—You have found the lease good for 16 years from the death of the last heir of entail; and, in doing so, you have done no injustice to the present heir.

Lord *President*.—I said, when the case was last before the Court, that the interlocutor might have been differently worded. In place of 19 years from the 1788, it might have been 16 years from the 1791; but the meaning of the judgement was, that the endurance of the lease should run from the date of the agreement.

Lord *Justice Clerk*.—There would be a great deal in Mr Ross's argument, if the new rent had been made to take place from the 1788. For we then should have obliged the tenant to pay both rents. But this is not the case; for, although you find that this is a lease for nineteen years, and make these nineteen years run from the date of the agreement, yet, in regard to the rent, you do not make the new rent payable until the old lease expires.

This petition was unanimously refused, 27 November 1792.

For the Pursuer, Alex. Wight,	} Adv.	John Scott, C. S.	} Agents.
Defender, Geo. Ferguson,		John Grant C. S.	
M. Ross,			
Lord Dreghorn, Ordinary,		Home Clerk.	
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VII. CHARLES WEBSTER, Merchant in Forfar, Pursuer,

AGAINST

John Farquhar, Esq; of Pitscandlie, Defender.

An heir of entail having become bound to repay to a tenant, at the expiry of his lease, the expence of building certain houses necessary for the entailed estate, the claim of the tenant was found to affect only the heir with whom he contracted, or his representatives, but not to affect the next heir of entail.

The estate of Pitscandlie is strictly entailed, under conditions *de non alienando et contrahendo debita*. In the 1772, Thomas Farquhar, then proprietor of the estate under the entail, entered into a lease with John Webster, the pursuer's father, setting to him 40 acres of the hill of Pitscandlie, for 19 years, after Michaelmas 1772, at the rent of 16l. This tack contains

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turns the following clause: "And in respect there are no houses at present upon the foresaid ground, the said John Webster, or his above-written, are to have liberty to build a barn, byre, stable, or other houses, they may judge necessary thereupon; it being hereby agreed, that, immediately upon such houses being built and finished, the same shall be appraised by men mutually chosen by both parties; and, whatever the houses shall be thereby valued at, the said Thomas Farquhar hereby obliges himself, his heirs and successors, to pay the amount thereof to the said John Webster, or his assigns, at the expiry of this tack."

In terms of this agreement, several houses were built upon the farm; and the heir of entail having refused to appoint persons for valuing the houses, an action was brought before the sheriff, for having the value ascertained; in which action a decree was pronounced, "Finding that the expence of building the house, barn, stable, and two byres, amounted to 741 sterling; that these buildings were necessary for the farm; and that Mr Webster was entitled to reimbursement of that sum from the said Thomas Farquhar at the expiry of the tacks."

Thomas Farquhar, the granter of the lease, died in spring 1789, without any representative in his personal estate, and was succeeded in the entailed estate of Pitcandlie by John Farquhar the defender. This gentleman brought an action of removing against Charles Webster, the son of the original tenant, who, on the other hand, insisted for payment of the value of the houses to which the sheriff found him entitled, and qualified his decerniture in the removing with that payment.

This judgement was brought under review of the Court of Session. The defence offered for the heir of entail was, that he represented his brother no otherways than as heir of entail. The tenant, in answer to this, contended that a melioration of this kind did not fall under the prohibitions of the entail; and, further, that, as the heir was *locupletior factus*, he must be liable for the improvements. On advising the cause, Lord Henderland, before whom the question came, pronounced this judgement: "In respect that the deceased Thomas Farquhar, by whom the lease upon which the pursuer founds his claim was granted, possessed the estate upon which the farmhouse and others were built, of which the value is now claimed only as heir of entail; and that the defender, John Farquhar, only represents the said Thomas as heir of entail in the said estate: advocates the cause, and assoilzies the said defender, John Farquhar, from the action; finds no expences due to either party, and decerns."

This judgement was brought under review by the pursuer.

The

The restrictions of entails are strictly interpreted. Let the intention be ever so clear, no effect is given to it beyond the letter; nor is any effect to be given to the letter beyond the intention. The object of this, as of all entails, is to augment the family of the entailer; and, whatever adds to the value of the estate, coincides with the views of the entailer.

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Argument for
the Pursuer.

Instances will readily occur to illustrate this observation. The expence of repairing the aqueduct of a valuable mill, by which a part of the estate, worth a hundred times the expence, is saved, or the expence of draining a tract of marshy ground, by which it would be rendered of great value, are claims which cannot be considered as falling under the prohibition of an entail. So far from it, they preserve or increase the estate to the heir, and are burdens which no maker of an entail (were the question put to him) would consider as not proper to be imposed upon his heirs.

Here the heir is under no restriction, as to granting leases, excepting in regard to the duration of them; the granter of the lease might therefore, in place of raising the rent to triple the old rent, have let the lands at the old rent, or even at one half of that sum, and taken a grassum; or, in place of giving the tenant a claim at the end of the lease, he might have reimbursed him for his outlay, by giving him the farm at a lower rent for some years, and that either at the beginning or at the end of the lease, without the danger of any objection. But, although there be some difference in form, there is none in reality, between these cases and the present.

But, farther, the defender is liable, as being *locupletior factus*. The buildings, as they were necessary for the farm, had they not been built by the pursuer, must have been built by the defender. He is therefore liable for their expence, not as representing the granter of the lease, but upon his own account, *quasi ex contractu; nemo locupletari debet aliena jactura*. Suppose the pursuer had laid out the money, as a *bona fide* possessor, his claim for indemnification would have been the same. The buildings being necessary, it is the same as if the pursuer had desired the money to be laid out, or as if he had borrowed it from the defender.

This may also be illustrated by analogous cases. Suppose the heir in possession to purchase up a right of servitude, of thirlage, or of pasturage, or a locality affecting the estate, the transaction is so far completed, that the entailed estate is freed of the incumbrance, but the heir dies before the price is paid; the succeeding heir could not refuse payment, whilst he, at the same time, was in the full enjoyment of the estate.

Or the heir in possession lays down lime, or marle, or other manure upon the estate, but dies before any benefit is reaped

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from

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from it, and leaves the price unpaid, the Court would not hesitate to find the heir in possession liable for the price.

The defender has founded much of his defence on the act of Parliament the 10th of his present Majesty, and insists, that, where the regulations of that act are not observed, succeeding heirs of entail cannot be affected by the transactions of their predecessors. But, 1st, That act is intended to give the heir in possession a claim against the succeeding heirs for money laid out by himself, which is a very different case from the present, where the question is with a stranger. An heir of entail is proprietor, and he is represented to a certain effect by the succeeding heirs; it is therefore anomalous that he should have a claim against his own representatives for money laid out upon his own property; and a special enactment seemed necessary for that purpose. 2dly, When money is laid out in terms of the act, there is no occasion to show that the estate is *lucratus*; so that the statute goes beyond the common law principle founded on by the pursuer.

Argument for
the Defender.

There are two questions here in point of law; 1st, The general question, whether an heir in possession of an estate under a strict entail can, at common law, in virtue of his right, as a limited fiar, enter into a contract of lease, by which a debt may be created against the estate, when it descends to the succeeding heirs of tailie; 2d, Whether, upon the supposition that he might enter into such agreement with tenants, with a view to promote the improvement of the estate, his power must be confined to common acts of administration?

With respect to the first of these questions, the proprietor of an estate strictly entailed has no power to contract a debt upon it, under the form of a lease, more than under that of any other deed. He has no power independant of the statute to improve an estate at the expence of succeeding heirs. Even the construction of farm-houses seems to form a burden upon the present possessor, which cannot be transferred against his successor; and it is certain that a tenant has no action against his landlord for improvements, on the footing of his being rendered *locupletior*. If, then, a tenant has no such claim, unless in consequence of a specific obligation, a preceding proprietor of an entailed estate must be destitute of all means to subject his successor in the value of improvements.

The principle upon which an action for melioration can be maintained, is a *consensus presumptus* founded upon the rule, that *nemo rum alterius damno sine ratione debet locupletior fieri*. But this *consensus* does not hold in every case where property is meliorated. If a person take my plank of mahogany, knowing it to be mine, and make cabinet work of it, I have my *rei vindicatio*, and he has no action founded on a *negotiorum gestio*. He thus suffers a

a loss, but he has incurred it with his eyes open. Again, a tradesman takes possession of another person's ground, and builds upon it; he has no action for reimbursement. Upon the same principle, the liferenter cannot create a debt against the fee, by improvements on the liferented estate. An action for such improvements would be inextricable. For, how could it appear, what part of the increase of a rental arose from the outlay of the former proprietor? and what part from the gradual improvement of the country? and, a *fortiori*, the benefit arising from an elegant mansion-house, can never be measured by the expenditure.

Besides, the owners of entailed estates are little more than a succession of liferenters; and, were the defender to pay the price of the houses erected by the pursuer, he could not establish it, as a debt upon the estate. To make him liable, would therefore be a most oppressive judgement against him; and to make it a debt upon the estate, would be a virtual repeal of the act authorising entails.

It was these principles which impressed the Court, in pronouncing the decision in the case Campbell of Blythwood, against Dillon*. There Dillon had taken a lease from the proprietor of the entailed estate of Blythwood, which lease contained a clause, obliging the landlord, at the end of the lease, "to pay the value of the said sheds and buildings, as the same shall be ascertained by persons to be mutually chosen between the parties." A claim was brought in virtue of this clause, against a succeeding heir of entail, who represented the grantor only as heir of entail. Lord Braxfield (present Lord Justice Clerk) absolved the heir from the claim. The Court altered, "from consideration of the whole circumstances of the case." But, upon a second reclaiming petition, "The Lords, in respect of the prohibitory, irritant, and resolute clauses, *de non contrahendo debita*, in the tailie of the estate of Blythwood, and that the defender, the heir of entail in the said estate, does not represent the late Blythwood in any other manner; therefore, find that the defender is not liable in the payment of the buildings within mentioned." In that case, upon the side of the heir of entail, were quoted the cases, Leslie of Balquhain v. Orme, and Burns v. Creditors of M'Lellan; collected by Clerk Home, 3d December 1735. In the former case, Orme had advanced money employed in preventing the estates from being carried off by a different set of heirs of entail; but he was considered as a creditor of the heir of entail only who employed him. In the other case, it was found that

* In this case, there is a reclaiming petition on the point, whether burgage tenements can be entailed under the statute 1685.

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that a proprietor, having employed a tradesman to repair a house, and become bankrupt, the tradesman had no preferable claim on the subject, on account of the creditors having been rendered *locupletiores*.

Upon the *second* point, the defender does not dispute that a limited *fiar* has a right of rational administration, and may grant leases, (when not restrained), upon conditions of improvement, but then the considerations for the improvements must be laid equally on every year of these leases. To provide a reimbursement to the tenant at the end of the lease, is an attempt to reap the benefit of the improvement, and to lay the debt upon the succeeding heir of entail.

It must have been upon the grounds which the defender has laid down, that recourse was had to the legislature, in order to enable proprietors of entailed estates to draw from their successors a certain proportion of the expense of their improvements. The act, 10 Geo. III. c. 93 enables heirs of entail, to grant leases of a certain duration; it enables them, to lay upon their successors three-fourths of the expense of inclosing, planting, draining, &c. It enables them further, to impose a certain share of the expenses of building a mansion house upon the succeeding heirs; but then certain regulations and forms of intimation, are to be observed. Now, these regulations must have been absurd, if at common law, an heir of entail was entitled to lay the expenses of his improvements, upon succeeding heirs.

But the pursuer says, that the claim of a stranger is in a different situation; yet if the heir of entail can secure a stranger, he may secure himself; and, although it may be true, that the statute exempts from any proof of the successor's being *lucratus*, yet it limits the action, so that the gain must always exceed the claim.

Opinions.

Lord President.—His Lordship observed, that the case of Campbell of Blythwood and Dillon was precisely similar to the present.

Lord Justice Clerk.—Agreed in this observation.

Lord Swinton.—An heir of entail ought not to be rendered *locupletior*, at my expense.—I shall put a simple case, an heir of entail, desires a tradesman to build a house on the estate, the house is built, the heir of entail dies, is the price of this house to be recovered from the executor of the deceased only? surely not.

Lord Justice Clerk.—If this opinion of Lord Swinton's be well founded, where was the occasion for the late act of parliament? yet the legislature thought it necessary to give the heir of entail relief for money laid out upon the estate. I have no idea of making an heir of entail liable for a debt which

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which is not a burden by the entail; were it otherwise, the heir of entail might not be able to take the case of Lord Swinburn. But the heir builds a house; suppose this to be a debt, that house is burnt down, another is erected; this suit also is no debt. I shall suppose another case; a prudent heir of entail lays out a great sum in improvements, he increases the rent very considerably, the estate is *lucrative*, this also is a *quintessence*; then comes a grackless heir, who allows all to go to ruin, (and things are much sooner destroyed than brought to perfection,) yet the debt incurred in making the improvements, remains still a burden upon the estate, while the rents are reduced to their former rate. It is thus easy to show, that if this principle be admitted, every entail might in a few years be brought to an end.

Lord *Essex* says, An heir of entail has power to make every rational stipulation; and an heir of entail taking up the estate should be obliged to make good every rational stipulation of the preceding heir. Suppose that an agreement is entered into betwixt an heir of entail, and a tenant, by which the houses on the farm are to be valued at the beginning, and at the end of the lease, if the value falls short of what it was at the beginning, the difference shall be paid by the tenant to the landlord; if it exceed the value at the beginning, then the difference shall be paid by the landlord to the tenant. Should it so happen, that, at the expiry of such a lease, the houses were less valuable than at the first valuation, I can have no doubt, but the heir of entail in possession at the time would alone be entitled to receive the difference. If I am right in this, I have no idea that the heir of entail should get quit of the obligation, when the value happens to be increased, and comes to be paid to the tenant. This argument will not go the length of enabling the tenant to build a palace; and it is no doubt more applicable to the circumstances of the other case*, than of the present; but where there are mutual stipulations, and the heir has the benefit on one side, I think he must be liable on the other for the loss. But the case now before the Court does not create any doubt. The tenant has a power of building houses; this is unreasonable, and the obligation to repay the value, is merely a postponed obligation, good against the representative of the heir who enters into the agreement, but not good against the succeeding heir. Supposing a person to make a purchase of land, where the tenant had unlimited power to build houses, and to lay the expense on the landlord, the tenant's claim for such buildings would not be good against the purchaser; and if not good against him, such a claim would not be good against an heir of

* The case referred to by his Lordship is in No. VIII. of this title, which was decided the same day with this case.

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of entail. The obligation being contained in a lease is of no consequence; it is not good against the succeeding heir of entail.

Lord President.—I understood this point to have been settled in the case of Blythwood, where an expence was laid out in virtue of a lease, and much for the benefit of the heirs of entail. That case was carefully considered, and you decided upon it with great deliberation. In leases, the expence of building should be paid at the beginning of the lease.

Judgement.

The Lords refused this petition.

It may be proper to observe, that although the Lord Ordinary had expressly found no expences due to either party, and although this judgement had not been reclaimed against by the heir of entail, yet the Court found the heir of entail entitled to the expence of extract.

For the pursuer, Adam Rolland, } Adv. { James Young, } Ag.
Defender, Allan M'Connachy, } { James Stormont, }

Lord Henderland, Ordinary.

Home, Clerk.

VOL. X. No. 1.

VIII. PETER TAYLOR, late Tenant in North Quarter of Kilrenny, Pursuer;

AGAINST

WILLIAM BETHUNE, Esq; of Balfour, Defender.

The expence of repairing houses on a farm, part of an entailed estate, having been demanded from the heir in possession, in virtue of a clause in a lease entered into with a former heir of entail, the action was dismissed, in respect that the claim had been satisfied by the executor of the contracting heir of entail.

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Henry Bethune of Balfour executed a strict entail of his estate, under the condition of not contracting debt, &c. In the 1769, Mrs Ann Bethune, the heiress in possession under the entail, entered into a lease with the father of the pursuer, which contains the following clause: "And in regard that
" the houses on the said farm have been appraised by two
" neutral persons at Martinmas last, therefore it is agreed
" by both parties, that, if the same are found to be of less
" value at the expiry hereof, in that case the tenant shall be
" obliged to pay up the difference; and if they shall be found
" to be of greater value, the said proprietor shall be obliged to
" pay up the difference to the tenant."

There

There was a bill for rook granted by the tenant to Mr Bethune of Kilconquhar, the husband of Mrs Ann Bethune; the one party says that this was for a grassum; the other, that it was the arrears of rent due in the 1779, when the bill was granted, but it came to Mr Bethune *jure mariti*; and upon his death, it went to his nephew and representative, John Lindsay Bethune of Kilconquhar, who in the 1785, several years before the expiry of the lease, having got the value of the houses ascertained, and found them to amount to 63l. paid them to the tenant, by discharging the bill for 105l. and taking a new bill for the balance.

Mrs Ann Bethune, the granter of the lease, had died in the 1781, and was succeeded by the defender under the definition of the entail. Upon the expiry of the lease, the pursuer was due a year's rent, out of which he claimed retention for the value of the meliorations, in terms of the clause above recited; and the sheriff of Fyfe, before whom the question originally came, found the tenant entitled to his claim. The question was then brought into this Court, and coming before Lord Gardenston as Ordinary, his Lordship Nov. 12. 1791 "repelled the reasons of advocacy, approved of the judgment of the sheriff, and in terms thereof found that the difference betwixt the original valuation and the estimate made at this removal is 63l.; therefore finds the defender liable to the pursuer in that sum."

When this question came before the Court, it was urged for the heir of entail, that Mr Bethune of Kilconquhar was the proper debtor in the obligation for the expence of houses, of which he himself derived the benefit; that he had desired his nephew to pay that demand, and the nephew had accordingly paid it. This payment, it was said, must discharge the claim. The tenant, on the other hand, allowed he had received a sum equal to the amount of the meliorations, from the nephew of the late Kilconquhar, but it was meant, he said, as a present to him, and by no means as an extinction of the claim against the heir of entail; it was further urged for the tenant, that the nephew of Kilconquhar never could mean to discharge a debt due by the heir of entail of the estate of Balfour, whom neither he nor his uncle in any shape represented.

Besides the facts attending this case, the general argument on the question, whether an heir of entail can be bound to repay the expence laid out by a tenant, in virtue of a lease entered into with a preceding heir of entail was argued. But the argument upon this point will be found very fully stated in the preceding case.

The

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The judgement of the Lord Ordinary having been brought under review of the Court, the following opinions were delivered.

Opinions.

Lord *Justice Clerk*.—I am clearly of opinion that the interlocutor is wrong. There are here two questions; one a general question, in which the heirs of entailed estates are very much interested, and upon which the Court will have an opportunity of deciding in the next case * which comes before us; the other, whether this claim has been extinguished by payment. It is necessary then to consider the nature of this claim, and whether it falls upon the heir, or upon the executor; and I hold that, when a landlord obliges himself to put the houses on a farm in repair, although the land goes to the heir, the obligation to repair the houses, lies upon the executor; nor is it of any consequence whether the payment is to be made instantly, or at the end of the lease, in either case, its nature is the same; it is a moveable obligation, and demandable from the executor of the landlord. The heir may, no doubt, be liable to the tenant, but it will fall ultimately upon the executor. Questions have arisen on steelbow tacks, where the tenants are obliged to restore the stocking at the end of the lease; whether does that stocking go to the heir or to the executor? Your Lordships have found that it was a moveable claim, and that the stocking falls to the executor; and when escheat remained part of our law, the stocking fell under the single escheat of the landlord. The stocking *in bonis* of the landlord at his death goes to the executor; and this claim is one which must come upon him; therefore, had the heir paid the debt, he would have had a claim of repayment against the executor. The executor has actually paid the debt; he was the proper debtor; and the claim must be extinguished.

Lord *President*.—This interlocutor appeared to me to be wrong, both in fact and law. It is a good answer to this pursuer, that the debt has been already paid.

Lord *Eskgrove*.—His Lordship thought the pursuer had no title to make a second demand for the expences of the houses.

Judgement.

The Court unanimously altered the judgement, dismissed the action, and gave the defender the expence of his answer.

For the Pursuer, Geo. Ferguson, } Adv. { D. Lister,
Defender, Dean of Faculty. } { Rob. Anslie, C. S. { Agents.

Lord Gardenston, Ordinary, Menzies, Clerk.

VOL. X. No 2.

* His Lordship refers to Case VII. of Entails.

I. JAMES RUSSEL, Upholsterer in Edinburgh,

AGAINST

JOHN SIMES, Saddler in Coupar of Angus.

So long as executry funds are *in medio*, an interpellation at the instance of a creditor entitles him to a *pari passu* preference with those who have obtained decret against the executor, even within the six months.

Adam Littler died on the 2d September 1788. On the 15th January 1789, James Ruffel, a creditor of Littler's, brought an action against the widow, who had been decerned executrix, and on the 11th March following he obtained decret against her in absence. Other creditors of the deceased conveyed their grounds of debt to John Simes, who raised his action against the executrix on the 6th March 1789, but did not obtain decret till the 23d December following, in consequence of the opposition he met with from the executrix. The funds were still *in medio*, and the executrix called these creditors to dispute their preferences in a multiple-poinning.

CASE
I.

The question at issue was, whether Ruffel, in consequence of his citation within the six months, was not entitled to a preference over Simes who had made no demand within that period. Lord Dreghorn, before whom the question came, "found that James Ruffel is not entitled to be preferred to John Simes, although the decree he has obtained be prior, because its priority is owing to the executor having given him no opposition, whereas she litigated the matter with Sime, and obliged him to bring a proof; so that to give a preference to the prior decree in such circumstances would be to allow the executor to prefer the defunct's creditors as he thought proper: Finds therefore that Ruffel is to be ranked *pari passu* with Simes." This judgement was brought under review of the Court. Feb. 27: 1790

An executor is a trustee for all concerned in the funds of the deceased, and as such he is bound to make payment to the creditors, whenever a decree, which is his proper warrant, is produced to him. A decree of constitution against an executor is of the same nature with a decree of forthcoming against an arrester. Nothing further can be done unless by personal diligence, consequently it is the duty of the executor to make payment on the decree of constitution, and if payment be made, there is no ground on which repetition can be demanded from the creditor. But the law will hold that to be done which ought to have been done, and will prefer

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I.



fer the creditors of a defunct, according to the date of the decrees they have obtained.

Thus stood the law formerly; but as creditors at a distance must necessarily have been excluded from any share of the effects of their deceased debtor, it was provided that a creditor citing the executor, or obtaining himself confirmed, or citing an executor creditor, before the expiry of six months from the debtor's death, should be entitled to a *pari passu* preference with those creditors who had used more timely diligence. Regulations 1654, and act of sequestration, 28th July 1662. By this no preference was created, on the contrary, the intention was to defeat for a certain time the preferences which those creditors possessed at common law who had obtained decrees. And accordingly, had any creditor in this case obtained a decree within the six months, Ruffel, as having used citation within that time, would have been preferable *pari passu* with that creditor to the exclusion of Simes, who had not cited the executor within the six months.

After the expiry of the six months, the competitions of the creditors are left to be determined by the principles of common law, 13th February 1742, Creditors of Crichen, Rem. Decis. No 27; and so much is a decree considered as giving a preference from its date, that so late as the 1723 it was decided in the case of Sir J. Gray, that a bare citation was sufficient to create a preference, although it was afterwards altered, 15th February 1738, Graham, Dictionary, vol. 1. p. 207. It is likewise established to be law, that an executor, after the expiry of the six months without any decree, and in virtue of his right of retention, is preferable to those creditors who have not used diligence, nor followed any of the steps prescribed by the act of parliament 1662 within the six months. Falc. 1st December 22 1744, Creditors of Crichen.

That a decree against an executor gives a preference from its date, is laid down by most of our authors, Thus Stair, p. 538, § 69. Ersk. p. 669, § 45, 46. Kaimes Elucid. Art. 37.

Argument for
Simes.

Ruffel has represented his decree as precisely in the same situation with a decree of forthcoming on an arrestment and as vesting in the creditor a right to the funds. But they are very different, an arrestment establishes a nexus on the subject arrested, and the forthcoming completes the diligence in the person of the arrester. The funds of the defunct in the hands of an executor are liable to no such nexus. They are in the hands of a trustee for behoof of all having interest, he must distribute them with impartiality nor can he pay without a sufficient warrant. That warrant is a decree, which is necessary both to ascertain the debt, and to authorise him to pay. This is evident from two circumstances, 1. Debts acknowledged

ed by the deceased in his testament are in the same situation with those constituted by a decree; 2. After decree is obtained by one creditor, citation by another before actual payment, is an interpellation which prevents the executor from paying the creditor who has obtained the decree.

CASE
I.

When there is no interpellation, the executor may after the expiry of the six months pay with safety to any creditor producing a decree; but if before actual payment an executor receives a citation from another creditor, he must call both creditors to dispute their preferences in a multiplepounding. The decree which each creditor produces entitles him to payment of his debt, but neither decree takes any notice of the other, or gives the one any right of preference over the other, consequently their preference if that be necessary, must be settled in a court of law. If either be entitled to any preference they are then in the situation of creditors who have decrees against their debtor, but who have taken no steps to attach his effects if there be sufficient they will be paid fully, if there be a shortcoming each will bear an equal share of the loss.

It must be admitted, that some of our lawyers have held that the date of the decree is the rule of preference, and there is one decision in the dictionary which favours the opinion. The latter practice of the commissary court, however, has been to prefer the creditors of the deceased, after the lapse of the six months *pari passu*, whatever may have been the date of their decrees.

Lord Kaimes has been quoted by Ruffel in favour of his plea: but the passage when taken altogether has a contrary tendency; Elucid. art. 37.—Lord Stair B. 3. tit. 8. § 69. The decision on the authority of which his Lordship's opinion is founded, affords an additional ground for Simes plea. His Lordship observes, "That after the six months, creditors pursuing, are preferable according to their diligences, and the collusions of executors cannot prejudice them by defending against one and not against another." In this case there was collusion, and Sime's was opposed while Ruffel was allowed to take his decree in absence.

Dic. of Decis.
Vol. I. p. 153.

The Court refused the desire of the petition and adhered to the Lord Ordinary's judgement.

Judgement of
the Court.

The judges who spoke were unanimously of opinion that so long as the funds of a defunct remain in the hands of an executor, every creditor who puts in his claim, has a title to a *pari passu* preference; and that, notwithstanding that some of the claims may not have been entered till after the expiry of the six months, while other creditors had obtained decree against the executor within that period.

C A S E

I. It was observed by one of their Lordships that the act of sederunt, 1662 was not intended to give a preference, on the contrary, it was the object of that act to prevent preferences, and to entitle every creditor of the deceased, who entered his claim within six months of the debtor's death, to an equal share of his effects with those, who from situation or from other circumstances, had been enabled to do more timely diligence.

It was likewise observed that an executor paying *bona fide* after the expiry of the six months *primo venienti* does right, he knows of no other claim and he was bound to pay it.

For Ruffel, David Williamson, } Advocates, J. Young, } Agents.
Simes, James Turnbull, } J. Adamson }

Dreghorn Ordinary.

Hume Clerk

Vol. II. No. 10.

FIAR AND LIFERENTER.

ANN STEWART of Inchgairth, Pursuer,

AGAINST

ROBERT STEWART of Gairth, Defender.

In proportioning the burdens on the heir succeeding in a land estate, a liferenter is liable for no part of the former proprietor's debts, principal or interest, if the value of the fee be sufficient for that purpose.

C A S E

I.

The lands of Inchgairth, Nether Blairish, and Drummacharty, belonged to Patrick Stewart. Upon his death, the right to these subjects came to be vested in Ann Stewart and Robert Stewart. Ann had right to the fee and liferent of Inchgairth, and to the fee of Nether Blairish. Robert had right to the liferent of the lands of Drummacharty and Nether Blairish, and he had a claim to the immediate or contingent liferent of Inchgarth, in virtue of an assignation; he had also a right to the fee of the lands of Drummacharty, as substitute in the original destination to these lands.

With these rights in Ann and Robert, it came to be a question in what proportions the debts of Patrick, the last proprietor, were to be paid by these parties.

The debts were an annuity of L. 5, payable to the sister of Patrick, which was a burden on his heirs; L. 300, for which

which an heritable bond had been granted over the lands of Nether Blairish; and L. 1470 of a balance of the personal debts, after applying his executry in extinction of them.

C A S E

I.

Mutual actions had been brought for ascertaining the extent of the respective burdens. But it will be necessary to distinguish Ann Stewart as the pursuer, and Robert Stewart as the defender.

The mutual processes being conjoined, the Lord Ordinary "found the pursuer liable in payment of the heritable bond of "L. 300. also liable in a due proportion of the debts contracted by Mr. Patrick Stewart; and desired to hear parties "on the effect of the interlocutor."

As there seemed to be a question, whether the interest of this L. 300 ought to be paid by the fiar, or by the liferenter of the estate of Nether Blairish, over which this debt was secured, the interlocutor was kept open; and the Lord Ordinary having ordered informations on the whole points at issue, his Lordship took the cause to report, when their Lordships pronounced the following judgment: "The Lords find the pursuer, as fiar of Feb. 10. 1792.
"the lands of Nether Blairish, liable in payment of the bond
"for L. 300 Sterling secured on the said lands; but find the
"defender, Robert Stewart, as in right of the liferentrix of
"said lands, liable to pay the interest thereof during the sub-
"sistence of the liferent: Find, that the personal debts due by
"the deceased Patrick Stewart, fall to be apportioned on the
"pursuer and defender, according to the respective values of
"the different subjects to which they have succeeded; but
"that, in estimating the pursuer's succession, a deduction
"must be made effecting to the sum contained in the heritable
"bond, so far as she is found liable for the same, and to the
"value of her liferent right of the lands of Inchgarth, which
"the Lords find her entitled to enjoy, notwithstanding of the
"liferent right granted by Patrick Stewart to his sister: Find,
"that during the life of the pursuer, and of the sister of Pa-
"trick, the defender Robert Stewart is bound to relieve the
"pursuer of the interest of the personal debts; and, in case of
"the pursuer's death, is also bound to relieve her representa-
"tives of that interest during the life of the sister of Pa-
"trick: But, in case of her death before the pursuer, that re-
"lief shall cease, so far as respects the proportion falling on
"the lands of Nether Blairish; and remit to the Lord Or-
"dinary to proceed accordingly."

Against this judgement a petition was presented for the defender, craving to be relieved against certain parts of it, by which he conceived that he had not been put on an equal footing with the pursuer in proportioning the debts, admitting at the same time that the temporary interest of the life-

C A S E
VI.

liferenter was liable to the interest of the debts, and craving that he should be found entitled to the liferent of Inchgarth from the death of Patrick Stewart. This petition was appointed to be answered, and the answers took up the cause on the same footing, and considered the liferenters as liable for the interest of the debt during the existence of the liferent.

Opinions.

When this cause came before the Court, the Lord Justice Clerk gave it as his opinion, that a liferenter is not liable for the debts of the proprietor who constituted the liferent. If there be not sufficient funds for payment of his debts without encroaching on the liferent, then it must be affected, because the whole property of the deceased is liable for his debts; but if the sale of the fee be sufficient for that purpose the liferent is not to be touched. A liferenter cannot be served heir; he can make up no title; he possesses solely on the deed which constitutes his right; it is the fiar who enters by service; who represents the deceased; who is *eodem persona cum defuncto*; and who is liable for the debts of this predecessor. Where there are heirs portioners, and certain moveable debts which attach on no particular subject, but are equally due out of the whole, the burden must ultimately fall equally on these heirs. That is, a proportion on each corresponding to his share in the succession; and for ascertaining this the value of the subjects must be taken as they stood at the death of the former proprietor. If for instance one parcel was burdened by an heritable bond, that parcel must be valued *minus* that heritable bond. If another was burdened with a liferent, the value of that liferent forms a deduction from that parcel, thus the debts will be proportioned on the residuary value of those parcels after the respective deductions have been made.

May 15, 1792. On this view of the cause the Court pronounced an order, remitting the cause to Mr. Keith accountant, to make up a state, according to the different views of the parties, and appointing memorials to be lodged on the cause; and in particular on this point, how far the interest of the debt can be a burden on the liferent.

For the Pursuer, Alex. Wight, and
David Snythe, } Advocates.
Defender, Matt. Rosa, }

Ja. Beveridge, } Agents
Rob. Stewart, }

Lord Gardenston Ordinary.

Sinclair Clerk.

Vol. X. No. 4.

FOREIGN.

ARCHIBALD GOVAN and his Attorney, Pursuers ;

AGAINST

SPENCER BOYD of Pinkil, Defender.

Whether an obligation to convey a land estate in Scotland, when the obligation has been executed abroad and agreeably to the laws of the country in which it was made, be effectual to produce action here in implement of the obligation

James Boyd of Pinkill, by an agreement and letter of attorney executed in Virginia, North America, agreeably to the forms of that state, obliged himself to convey the lands of Pinkill in Scotland to Carter Braxton for a certain price ; and an action being brought before the Court of Session against Spencer Boyd the heir of James, the granter of the deed, for implement of that deed, the Lord Ordinary pronounced this judgment : “ Finds that the deceased James Boyd by the deed executed by him in America, in February and March 1783 in favour of the Bruxtons, though not executed according to the forms of the law of Scotland, so as to convey directly heritable subjects in that country, yet he thereby came under a personal obligation in implement of which he and his heirs might be shewed here.”

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Dec. 10. 1790.

Besides this point, there was another in the cause, namely whether the original transaction betwixt James Boyd and Carter Bruxton had not been of so fraudulent a nature on the part of the receiver as to prevent the Court from giving it effect. The Lord Ordinary found that there was not sufficient evidence of fraud, facility, or lesion : but the court on advising a petition and answers, were of opinion that there was evidence of the fraud, and on that ground dismissed the action. But on the question how far the obligation was sufficient to produce action, the following argument was maintained.

By the law of Scotland, which must be the governing rule in all questions with regard to heritage situated in Scotland, it is an established point, that no bargain of which land or other heritage is the subject, is binding on the parties unless reduced into writing. Till that solemnity be adhibited either party has full liberty to refile, in the same manner as if there had been only a verbal bargain. It has been further decided by

**Argument for
Boyd.**

“ the

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liferenter was liable to the interest of the debts, and craving that he should be found entitled to the liferent of Inchgarth from the death of Patrick Stewart. This petition was appointed to be answered, and the answers took up the cause on the same footing, and considered the liferenters as liable for the interest of the debt during the existence of the liferent.

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When this cause came before the Court, the Lord Justice Clerk gave it as his opinion, that a liferenter is not liable for the debts of the proprietor who constituted the liferent. If there be not sufficient funds for payment of his debts without encroaching on the liferent, then it must be affected, because the whole property of the deceased is liable for his debts; but if the sale of the fee be sufficient for that purpose the liferent is not to be touched. A liferenter cannot be served heir; he can make up no title; he possesses solely on the deed which constitutes his right; it is the fiar who enters by service; who represents the deceased; who is *eadem persona cum defuncto*; and who is liable for the debts of this predecessor. Where there are heirs portioners, and certain moveable debts which attach on no particular subject, but are equally due out of the whole, the burden must ultimately fall equally on these heirs. That is, a proportion on each corresponding to his share in the succession; and for ascertaining this the value of the subjects must be taken as they stood at the death of the former proprietor. If for instance one parcel was burdened by an heritable bond, that parcel must be valued *minus* that heritable bond. If another was burdened with a liferent, the value of that liferent forms a deduction from that parcel, thus the debts will be proportioned on the residuary value of those parcels after the respective deductions have been made.

May 15, 1792.

On this view of the cause the Court pronounced an order, remitting the cause to Mr. Keith accountant, to make up a state, according to the different views of the parties, and appointing memorials to be lodged on the cause; and in particular on this point, how far the interest of the debt can be a burden on the liferent.

For the Pursuer, Alex. Wight, and
David Smythe,
Defender, Matt. Rosa, } Advocates.

Ja. Beveridge,
Rob. Stewart, } Agents.

Lord Gardenston Ordinary.

Sinclair Clerk.

Vol. X. No. 4.

FOREIGN.

ARCHIBALD GOVAN and his Attorney, Pursuers;

AGAINST

SPENCER BOYD of Pinkil, Defender.

Whether an obligation to convey a land estate in Scotland, when the obligation has been executed abroad and agreeably to the laws of the country in which it was made, be effectual to produce action here in implement of the obligation.

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I.

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Boyd.

" the

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the Court, after full deliberation, that in order to exclude the *locus penitentiae*, which the law allows in all bargains of heritage, there must be a writing perfected according to all the forms which the law requires in order to make a deed complete. It has even been found that when there was a letter or other writing subscribed by the party, and the subscription acknowledged on oath, it was not sufficient to exclude the *locus penitentiae*, as the solemnities of the law had not been adhibited. Therefore the deeds in question being null and void by the law of Scotland, are no more effectual for producing a personal obligation to carry lands situated in this country, than if there had been merely a verbal bargain betwixt the parties, which might have been refiled from at pleasure, and could not have been made the ground of a personal action for implement.

Argument for
Govan, &c.

Whatever appearance of strength there may be in the argument for Boyd at first sight, it will be found on a due consideration to be of little moment. He has neglected a distinction (perfectly established and well known) between actual conveyances of heritage, and contracts of sale with clauses binding the one party to execute conveyances in favour of the other. The conveyances themselves, in order to effectuate the actual transmission of the property, must be drawn out according to the precise forms which our customs and acts of parliament have made necessary. Indeed it is reasonable to suppose, that in every country there are certain municipal institutions which must be precisely observed, in order to carry the property of land out of one man's person into the person of another. But although the modes of actually vesting the lands are thus regulated by the laws of the particular country where the lands are situated, yet a contract to convey lands is in its own nature a contract *juris gentium*.

The granting of a conveyance to land, according to the terms of the *lex loci*, is an act to the performance of which a party may bind himself in a foreign country, just in the same manner that he may bind himself to any other act; with regard to which, too, as well as with respect to the transmission of landed property, certain modes and forms must (in the greater number of cases) be followed in the country where it is to be performed, different from those which are practised in the place where an obligation has been granted.

The distinction between actual conveyances of heritage and obligations to convey it, has long been understood and acknowledged. The former, wherever they may have been executed, if they have not been done according to our own forms, are good for nothing, while with respect to the latter; if they have the solemnities required by the law of the place where they have been granted, are as effectual to produce action in

Scot.

Scotland, and to bar the *locus penitentiae*, as if drawn according to our statutory requisites. Erskine, B. III. tit. 2. § 40. Dict. of Decisions, vol. 1. p. 319.

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Lord *Esqgrove*, on this point, rather inclined to think, that *Opinion* a deed, which was to affect landed property in this country, must be a legal deed according to our law. His Lordship instanced the case of a tack where the statutory solemnities were required, and observed, that the contrary might be a very dangerous doctrine.

The Lord *Justice Clerk* observed, that Lord *Esqgrove* had given a doubtful opinion on this question; for his own part, he thought that an obligation, executed in a foreign country, if executed agreeably to the forms and laws of that country, must receive effect here. If it be an obligation to dispoise, an action for forcing the granter to convey, or an adjudication in implement, will be effectual.

Lord *Monboddo* agreed with the Lord *Justice Clerk*, as did also the Lord *President*.

For the Pursuer, Wm. Millar, } Advocates. J. Marshall, C. S. } Agents.
Defender, Robert Blair, } And Blanc, C. S. }

Lord *Ankerville* Ordinary.

Home Clerk.

VOL. X. No. 5.

II. Mrs. ELIZABETH STEWART, residing in Jamaica, and Others, Pursuers,

AGAINST

Mrs ELIZABETH WATSON, and Others, Defenders.

Letters of instructions to trustees, joined to a testament executed abroad, are sufficient to constitute certain liferents on funds heritably secured in this country.

Lieutenant Stewart in the service of the East-India-Company, remitted L. 1000 Sterling to William Stewart at Hill-side and John Taylor writer to the signet, to whom he had sent a general power of attorney for managing his affairs in Scotland. Alongst with the remittance he wrote to these gentlemen, desiring the money to be lent out on heritable security, and directing the application of the interest. This part of the letter was in these words; " One half of which (the L. 50 of in-
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CASE
II.

JAN. 1. 1750.

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Feb. 1. 1783.

“terest), or whatever it may be, I wish to be paid annually
 “to my mother, and the remaining half to Mr. Peter Camp-
 “bell, surveyer of the customs at Inverary, and in case of
 “the death of either, I request that his or her annuity may be
 “paid to my cousin Mrs. Elizabeth Watson, wife of Mr. John
 “Watson, rector of the grammar-school at Dundee; and in
 “case of the death of both my mother and Mr. Campbell,
 “I wish that the other portion of the annualrent may be
 “paid to my aunts, Mrs. Campbell relict of Mr. Campbell of
 “Auchuarn and Mrs. Cameron, widow of Mr. Alexander
 “Cameron, or the survivor of them, reserving to myself the
 “power of altering this arrangement or disposing of the prin-
 “cipal in such manner as I may find most convenient.”
 And by a second letter he alters the application of the money;
 he says, “I directed that failing of my mother and Mr. Pa-
 “trick Campbell, one half of it should be given to my aunts
 “Mrs. Campbell and Mrs. Cameron, but I omitted mentioning
 “that it was only in case of their being still widows, and un-
 “provided for, that it was to be so applied; and as I now un-
 “derstand that they are married, and not so much in want of
 “my assistance, as I before thought they might be, I think it
 “proper to alter these instructions so far as to desire that
 “you will, failing of my mother and Mr. Campbell, apply
 “half of the interest of the said sum of L. 1000 to the support
 “of my uncle Alexander and his children, the other half being,
 “as before directed, on the death either of my mother or of
 “Mr. Campbell, paid to my cousin Mrs. Watson, for her use
 “and that of her family.”

The L. 1000 (to the interest of which those directions refer) was lent out upon heritable security, payable to Messrs. Stewart and Taylor, and the survivor, as trustees for Lieutenant Stewart; and the interest was regularly applied agreeably to the above directions.

Soon after the date of the last of the above letters Lieutenant Stewart died in India, and there was found in his repositories a paper bearing to be memorandums for making up his will, which, in so far as related to the L. 1000, under the management of Messrs. Stewart and Taylor, was in these terms;
 “To direct the L. 1000, I sent to Europe to be applied in the
 “manner already directed; and after providing an additional provision to his mother and to his uncle’s family, and bequeathing certain legacies, he gives “the residue, if any, to John
 “Kenoway.” This will was proved before the courts in Calcutta, and letters of administration granted to the executors in India, it was proved also in the prerogative court of Canterbury, and letters of administration taken out by Mr. Taylor as the executor in Europe.

The

The £1000 lent out on heritable security was, after the death of Lieutenant Stewart, paid up to Mr. Taylor; and he having called the heir at law and annuitants in a multiplepoinding, the question came before the Court, upon informations ordered by the Lord Ordinary.

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Mrs. Stewart's claim rests upon that character, which is strongly and justly favoured by the law of every country, that is, as nearest and lawful heir of her brother. The plea which has been opposed to this claim may be reduced under two heads, 1. That by the instructions given by Lieutenant Stewart to his attornies here, the rights of the annuitants has been secured even after his death; and, 2d. As to the fee of the debt, that both by Lieutenant Stewart's instructions and by the memorandums for his will, or by these together, a proper and effectual settlement of the fee of this heritable debt was established, to which effect must be given, and by which the heir at law must be excluded. In opposition to this the heir is to maintain that neither the principal nor interest of the heritable debt can in any shape be affected by the instructions or by the will.

Argument for
Mrs. Elizabeth
Stewart the heir
at law.

As to the instructions they are not either in their nature or form a will or settlement of any kind to operate after the death of Lieutenant Stewart, even had the subject of these instructions been a moveable subject. They express no more than temporary instructions as to the management of a fund which he could not himself administer, and they never could have been considered as an authority for preparing a settlement, or in any other light than as directions respecting the interests then arising upon the heritable debt, and which he had occasion to vary in the course of his correspondence with his attornies.

The whole train of Lieutenant Stewart's correspondence show that he did not authorise his attornies here to make settlements of the money remitted by him upon those whom he wished in the mean time to support, nor did they construe his intentions in that way; on the contrary, they lent out the money upon heritable security upon his account, though, for conveniency, the bond was payable to them as trustees.

These instructions, therefore, according to the nature of a mandate, ceased with Lieutenant Stewart's life. The law of this country does not substitute an instruction to an agent as equivalent to a will. It is said that such instructions are in England equivalent to a will, but the present plea goes greatly farther, for they insist that directions in the ordinary course of administration shall be extended after death, and held to be equivalent to a will.

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This is a plea not only dangerous, but inadmissible. The law of this country requires a deed in one form or another to convey property; and for subjects of an heritable nature deeds of a peculiar form are required.

It is said that the annuities are constituted by a deed *inter vivos*, and that there was a substitution of these annuities, upon certain friends failing the original annuitants. But it is impossible to apply the description of a deed *inter vivos* to mere letters of correspondence betwixt a party and his attorney. It was a latent communication, which might or might not have been executed, and which no mortal had a title to enquire into: and as to the circumstances of the substitution of annuitants, there is nothing in it but what might have been expected from a person in India, giving directions to a person here about the application of his funds for the temporary accommodation of those with whose situations he was unacquainted; had he meant any thing more he would have ordered his attornies to have given bonds of annuity to his relations, or he might have ordered the money to be lent out to the annuitants in liferent, and to himself in fee; but his instructions are, that the L. 1000 should be lent out on heritable security on his own account.

Perhaps Lieutenant Stewart's attornies went too far in lending out the money payable to themselves as their power of attorney would have entitled them to have uplifted the interest due on the heritable bond; but it is clear that Lieutenant Stewart meant this money to be secured on his own account.

Suppose that Lieutenant Stewart had left a widow or issue of his own body, can it be supposed that he meant to exclude his wife and children from the legal right of succession. If not, the right of the heir at law can be as little affected by any legal construction to be put upon the correspondence.

With regard to the second point, namely, the fee of the heritable debt, it is disposed of neither by the instructions nor by the will. The correspondence relates solely to the payment of the interest, and does not dispose of the principal; and the will contains a reference to these instructions. But although it should be held that the fee, as well as the liferent, was meant to be disposed of by this memorandum for making a will, it is certain that by the law of Scotland no heritable subject can be disposed of by will.

It is an admitted principle, that a will executed by a person abroad can have no greater effect here than what is given to a regular testamentary deed executed agreeably to the law of this country; and it is a fixed principle in the law of Scotland, that no subject heritably secured can be devised by a deed of

a testamentary nature. 21st June 1605, Jack against Gourlay.

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The defenders do not dispute the general principle; but they insist that the L. 1000 remitted to this country was a personal estate in Lieutenant Stewart; that the feudal right was in the trustees; and that he had only a personal claim against them; and this is supported by inference from the plans which it is said have been followed, in order to prevent the money of Englishmen lent out on heritable security in this country from falling under our law of death-bed. The security is vested directly in trustees, or taken originally to the creditor, and by him conveyed to trustees under a back bond. But these methods are contrary to law, and have never yet been sanctioned by the decisions of the Court. It is an express rule, that subjects in themselves properly moveable become heritable by the supervening of an heritable security; and it matters not whether that security be taken directly to the creditor, or to a trustee, who is accountable to him, Ersk. B. II. tit. 2. par. 14. Lieutenant Stewart seems, in this case, to have directed his money to be lent out on an heritable bond, taken to himself; but whether it was to be taken to himself or to his trustee makes no material difference.

Had the trustees uplifted the money, it is true a personal action would have lain against them for payment: but the money remained heritably secured at the death of Lieutenant Stewart, and the right of compelling the trustees to denude was a right which belonged to the heir at law, and could be taken up only by a service.

There are two points in this cause: 1. Whether the annuities constituted by Lieutenant Stewart's letters are at an end by the death of that gentleman. 2. Whether the fee belongs to the heir at law subject to these annuities. Argument for the disponees under the letters and will.

Upon the first point the defenders admit that Lieutenant Stewart reserved to himself not only the power of altering the arrangement as to the annuities, but also that of disposing of the principal sum, if his own necessities should require it. But the effect of this reservation (now that Lieutenant Stewart is dead), is to confirm these annuities for the life of the annuitants.

These annuities were constituted by a deed *inter vivos*, and in the only manner in which Lieutenant Stewart at that distance could constitute them, that is, by instructions to his attornies; his letters are not to be considered as a mandate, but as a deed of trust; and this is clear from the document itself and the nature of the business: Had Lieutenant Stewart desired his trustees to receive payment of a bill, and pay it over to any particular person, such an order might have been considered

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as a mandate. But the letters imply a ~~fact~~ of future time, and refer to a trust to remain in the trustees: had therefore Lieutenant Stewart died intestate the trust would have subsisted as long as the objects remained for which it was created.

The other point respects the fee of the L. 1000, and this divides into two branches, 1. Whether from the letters and will Lieutenant Stewart has disposed of the fee; and, 2. Whether, as it was heritably secured, he could dispose of it?

The defenders shall begin with the second branch; and they apprehend, that in regard to Lieutenant Stewart this was a personal estate, the heritable security was not conceived to him personally, but to his trustees, and the debtor had no connection with Lieutenant Stewart. The discharge of the trustees would have completely exonerated him; and had they spent the money, all that would have remained to Lieutenant Stewart would have been a personal action against his trustees.

Of late money from England has been lent out on securities over Scotch estates, and the methods which have been devised for giving the creditor the command of it, unsubjected to our law of landed property, are either, by lending out the money, as has been done in this case, where the trustee is bound to follow even the testamentary directions of the truster; or by taking the real security directly to the creditor, who disposes to a trustee, and takes from him a back-bond, obliging him to denude in whatever manner the truster shall direct.

In either of these cases the truster follows the faith of the trustee, and has no more than a personal action against him. The present case stands in this situation, and the defenders apprehend that the estate is to be considered as merely personal in Lieutenant Stewart.

The next point is, Whether Lieutenant Stewart did in fact dispose of the fee? and as this is an arbitrary question, it requires a complex view of the case. As Lieutenant Stewart had not mentioned the heir at law (who was his sister), in any of his settlements, it was inferred that he did not mean that she should succeed to him. With regard to his intention, it was said to be clear that he had limited his power of recalling his gift to the sole case of himself requiring the money; and that by the mode of expressing the conveyance, it was certain that he meant more than a mere liferent to his uncle Alexander, and his cousin Mrs. Watson the defender; for in the case of his mother dying when it was merely an annuity, the annuity was given to her alone; whereas in the other cases, the trustees were ordered to apply the produce of the L. 1000 "to Mrs. Watson, for her use and that of her family," &c. Besides the paper, which

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is now established to be the will of Lieutenant Stewart, is, in fact, merely a memorandum of the heads of his will, and that will is now to be extended. He says in it, "To direct the L. 1000 I remitted to Europe to be applied as already directed." And here it is necessary to consider the difference in the situation of Lieutenant Stewart from the time of writing the directions given to his trustees. He was then in health; he was now in a very dangerous service, and in bad health, and of course he was now disposing of his estate finally; in that light he must have considered the directions he had given formerly as settling the fee of the L. 1000; or he must have meant to give express directions for settling it, "in the manner already directed." It is also evident, from the additional provisions he orders in his will to the children of Patrick, (entirely omitting the children of Alexander, who appear to have been his favourites,) that he had considered them as previously provided for by his directions to his trustees. Upon these grounds the defenders maintained that the annuities should remain during the lifetime of the annuitants.

The pursuer has, in the last place, maintained, that her brother has, at the utmost, subjected the fee to certain liferents; but this is a *petitio principii*. The sum is given to the children of Mrs. Watson, &c. which is a generic term, comprehending the descendants of the favoured person; the rule of the Roman law is to be found in l. 220. D. uf. and independent of this, Lieutenant Stewart, uses the expression of children and family as synonymous terms, he could not mean to create a perpetuity of liferents branching out and dividing the annuity of L. 25. to every descendant of his uncle and Mrs. Watson. Besides, the law does not admit of such *fideicommissa* it presumes that the fee is vested in the first degree or class: and so the court have decided, 1787, Barre v. Simpson, William Donaldson, residing in Jamaica, made his will, and ordered L. 1500 to be lent out to be liferented by his natural daughter, the mother of Barre, and after her death the annual rent to be equally divided amongst the heirs of his body. The Court found that this was a fee in the heirs.

Lord President.—It is common to grant English trust-deeds taking the trustees bound to apply the trust-funds to such ends and purposes as the granter shall appoint by a writing under his hand; but the question here is, whether a will or testament be sufficient to declare ends and purposes? It is true that in Auchterlonies case any writing under the trustor's hand was deemed sufficient; but then, as the disinheriting of the heir is an end and purpose which cannot be declared on death-bed, a testament within the sixty days will not be sufficient. The question before the House of Lords in Auchterlony's case was,

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was, whether a will granted before the sixty days was sufficient to declare ends and purposes?

Lord *Eskgrove* said he was a counsel in Auchterlony's case, and knew it well. The Lord President has given a just account of the point which was under consideration. There was a reserved power to apply the funds by a writing under the truster's hand, and this reserved power was found to be properly exercised by a testament executed before the sixty days. There is a difference betwixt a reserved power to alter, when the proprietor divests himself by a disposition to a third party; and when he reserves a power, like the present, of applying his funds by a writing under his hand. In the former case, the disponent cannot object, because the disposition is his only title, and he must take it with its burdens or not at all: the heir has no title to object, because, though the testament applying the sum in the reserved power were cut down, he would not have any claim, since it would only tend to enlarge the funds of the disponent. But in the present case it is widely different, the heir has here a direct interest.

Lord *Justice Clerk*—I have no doubt of the propriety of the decision in Auchterlony's case; but attend to the circumstances in which the money was lent out in this case. Lieutenant Stewart remitted the money to his two friends in Scotland, who were to manage it till their powers were recalled. It was not Lieutenant Stewart's meaning that this money should be lent out in their names as a debt due to themselves, but as a debt due to them as his trustees. No man who is acquainted with business is fond of allowing his trustee to vest the money in his own name simply, even with a back bond. The money in this case then was lent out in the name of these two gentlemen as trustees for Stewart. It was vested by *saſine*, and is feudal, and heritable of course. It is argued on the one hand that it is feudal in the person of the trustees only, and a mere personal right in Lieutenant Stewart; this I deny, as contrary to all the principles of the law of Scotland. Suppose that Stewart had died, these trustees could not have uplifted a farthing after his death. Suppose the security had been taken to these gentlemen in their own names, the heir at law of Lieutenant Stewart might have made up his titles, and brought a declaratory action that they were mere trustees, and that he was heir at law to the truster, the real proprietor of the sum: And the Court would have sustained his plea. But here there is no occasion for this; these gentlemen are trustee *in gremio* of the security. The secured sum was a feudal subject *in hereditate jacente* of Stewart on his death, and to which the heir might have made up his title by a special service, &c. Hence it is clear that this is a feudal subject, not disponable by testament. If the testament contained proper disposing words, no doubt it would have carried

nied the subject, but a simple nomination of a residuary legatee will not. It has been said, however, that this holograph memorandum is a good will by the law of England; allowing it to be so, it will not carry this principal sum.

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It is no doubt a common practice with Englishmen to vest their money heritably secured in Scotland in the person of trustees; the security is taken in the trustee's name simply, with a back bond in favour of the truster; and so *ex facie* the right is in the trustee, feudally vested. It does not fall by the death of the truster, the truster has it is true the disposal of the money by a writing under his hand; but the trustee may uplift the money, and give an effectual discharge. The effect of this is to give Englishmen who are unacquainted with the forms of our law, a power of applying their money as they please, without the necessity of a formal writing. But a sum so secured cannot be disposed of on death-bed; for it is a subject feudally vested for the truster's behoof, and descendible to his heir on his death.

Lord *Swinton* agreed with Lord Justice Clerk as to the principal sum; but, as to the interest, there was a distinction. It divided into two parts, one of these became due before Stewart's death, and there is no question that it falls under the mandate. Another became due after, which I do not think falls under the mandate.

Lord *Monboddo*.—English debts secured in the manner which has been followed here are in the same situation as if taken in the person's own name.

Lord *Henderland*.—There can be no doubt of Lord Justice Clerk's principles: the only doubt is, whether these letters are to be considered as qualifications of the trust, and as affecting the heir in the same way as if the bonds had been taken with the burden of distributing the interest during the lives of the annuitants.

Lord *Esbrove*.—There are two questions, first, what power had Stewart? secondly, How has it been exercised?

I. As to the power. In considering the nature of the security, it does not appear that special directions were given at first: There were directions afterwards to secure it heritably, without restriction as to the manner, but the security must be presumed to be taken in the way most beneficial for the creditor. Perhaps Auchterlony's is the best form of security in such cases. There the truster had a power of directing the application by a writing under his hand. The objection in that case was, that the writing was within the sixty days, and that no conveyance of heritage is competent by testament; and so the Court of Session found; but the House of Lords viewed it otherways: They held the dispositive words in the trust-right, and the declaration of will in another writing, sufficient. They did not go the length of saying, that where there was no trust-right

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right a testament was sufficient to convey heritage. It was only the union of the dispositive words in the trust-deed, with the declaration of will in the testament, that they held sufficient. This case is not the same with Auchterlony's. The money here was directed to be taken in the most ample form, to enable the truster to dispose of it afterwards.

II. How has this power been exercised? There were two deeds of disposal, first letters, and secondly a testament, directing the money to be applied as before appointed: with regard to the letters are they mandates or deeds? there is nothing in them as to the principal sum; but as to the interest, they are full declarations that the annuities were not to be circumscribed to the term of the truster's life. The successive substitutions prevent us from supposing that Lieutenant Stewart meant to restrict their annuities to the term of his own life. If it be necessary to supply deficiencies in the letters, take the memorandum for making his will. It is a confirmation of what was directed in the letters, it shows his intention clearly: a man making his will mentions what is to be done after his death. The mention of these annuities in the memorandum shows that they were not to cease with his life.

Lord *President*.—The power is clear: there was no contract of marriage nor legitime, &c. to tie him up. Most of the Judges consider the letters as mandatory and testamentary; taken by themselves they are clearly mandatory; and had there been no will these letters would not have been testamentary. I am led to this by a decision of this Court, affirmed in the House of Peers in a case somewhat similar: A Lieutenant Stewart in India gave money to a Captain Dundas to give to his father here. The father died before Dundas arrived in this country. It was argued on the one hand, that the mandate expired by the death of the mandant, that the money must have been accepted before the mandate could have been completed, and before acceptance it could have been recalled, &c. On the contrary, it was said that the money must be presumed to have been accepted by the father: and that this deed was testamentary. The father's claim was accordingly sustained by the Court. On which ground, whether from considering it as of a testamentary nature, or from regarding it as a mandate, is not very certain. The House of Lords found the deed clearly to be not testamentary, and had great doubts as to the mandate. But the opinion prevailed, that it should be held rather to be complete, notwithstanding these doubts. His Lordship said he rather thought the letters in this case not effectual, but that joined with the will, perhaps they might be good. If again we take the will by itself, it can have no effect as to the interest, for it is an heritable subject. If considered as a declaration of ends and purposes it is not probative of its dates; in-

indeed, on looking in to it, I see it has no date, and must be regarded as a deathbed-deed. But there is another view of this case, the letters and will may be taken together, and although the letters be doubtful the construction of them may be aided by the will. It may amount to the same, as if he had said in writing, I have not expressed these letters clearly, I meant so and so.

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Upon report of Lord Hailes, and having advised the mutual informations for the parties, the Lords prefer Mrs. Stewart, mother to the deceased Lieutenant Duncan Stewart, and Mrs. Elizabeth Watson, each of them, to the one half of the interest of the L. 1000 in question during their respective lives, and failing Mrs. Stewart, by death, before Alexander Stewart; prefer the said Alexander Stewart in place of the said Mrs. Stewart, to the half of the said interest during the remainder of his life, and prefer Mrs. Stewart (the heir), to the fee of the said L. 1000 upon the death of the liferenters.

Judgement.
May 19. 1791.

For the Purs. W. Honyman, } Advocates. D. Balfour, W. S. } Agents,
Defen. G. Buchan Hepburn, } J. Taylor, W. S. }

Lord Hailes Ordinary. Hume Clerk.

Vol. II. No. 11.

G L E B E.

I. The Reverend Mr. JOHN ROBERTSON, Minister of Little Dunkeld, Charger;

AGAINST

His Grace JOHN Duke of ATHOL, JOSEPH CAMPBELL of Kinloch, Heritors of the parish of Little Dunkeld, and JAMES WADDEL, suspenders.

A minister has no power to feu out his glebe, though he may have a feu-duty in his offer greatly superior to what can be drawn from the glebe as a farm.

Mr. Robertson as minister of Little Dunkeld, has a stipend of 70 l.: he besides possesses a manse and two glebes, the glebe of Little Dunkeld, and the glebe of Lagganallachie, the former consisting of about six acres of arable land, and two of pasture; the other, which is at the distance of two English miles, consists

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sists of about four acres, one half arable, the other pasture. The glebe, consisting of eight acres, is worth, as a farm, about 20 s. an acre. But it lies commodiously for the erection of a village, and the minister was offered on a feu L. 6 an acre.

On receiving this offer, the minister laid it before the presbytery, who authorised the transaction on the footing of its being beneficial to the present and to future incumbents; and in order to guard against any injury to the heritors, by a claim for a new glebe, they declared that the ground feued out should be declared to be part of the glebe, and agreed that a deed declaratory of the transaction should be executed by the present incumbent and the moderator, and put on record, for the information and security of all concerned.

On this authority, and with the approbation of many of the heritors, the minister entered into a feu-contract with James Waddel, by which he feued to him six acres of the glebe for a feu-duty of L. 36 Sterling.

The Duke of Athol, and Mr. Campbell of Kinloch, two heritors of the parish, conceiving this transaction to be incompetent and dangerous for the heritors, a suspension was presented at their instance, on which Mr. Waddel, for his security, followed the same measures. These bills being past and conjoined, Lord Dunsinnan, before whom they came, ordered informations, and took the cause to report.

Argument for
the charger.

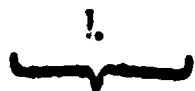
The charger's object was to show, 1. That there is nothing in the nature of the right which a minister has over his glebe, to prevent him from feuing it for his own benefit, and that of his successors in office. 2. That the law does not prohibit the feuing out of glebes, on the contrary, authorises it, provided it be not done to the prejudice of the benefice.

I. That the power of feuing is not inconsistent with the nature of the property appears from the following considerations:

Every minister may be considered either as a sole corporation (in the language of the law of England), or as a constituent part of the great corporation of the established church. Whatever is granted for the support of a minister, is intended not merely for the support of the individual, but for those holding the office in all time coming. Therefore, neither the incumbent, nor even the church as a body, have a right of disposal of any benefice, for such right would be inconsistent with the very end for which the lands or tithes were given. In the same way a feu or tack, which might affect the interest of a future incumbent, is inconsistent with that right of administration which an incumbent or the presbytery enjoy.

A right however to feu out lands belonging to any benefice for a fair feu-duty is not inconsistent with the nature of the property which a minister has in his glebe. But a minister can-

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c. 72. But this act was passed in order to put a stop to feus on a grassum, and other devices fallen on by the Popish clergy, in the view of the reformation. It was not the intention of the legislature to create an absolute prohibition to feu in every case.

It is true that a contrary interpretation is put on the act by Sir George M'Kenzie, in his observations; but this opinion he founds on a decision, 12th February 1635, Coke against parishioners of Auchtergovan, and he mistakes the import of it; he says the feuer was refused relief, whereas the court granted him relief.

The main stress of the suspenders argument is laid on the act 1572. c. 48. which contains this clause: "Whilkas
" manes and acres of land so marked and designed as said is,
" it shall not be leifome to the ministers or leaders, present or
" to come, to sell, analzie, sett in feu or in tacks, or to put
" any in possession of the samen in prejudice of their succes-
" sors, but the samen to remain always free to the use and
" easement of sik as sal be admitted to serve and minister at said
" kirk." This clause however favours the charger's plea, as it does not contain a total and absolute prohibition to feu in every case, but only in prejudice of the incumbent's successors.

This clause has been explained into an absolute prohibition to feu, under authority of Mr. Erskine, B. II. tit. 10. § 61. But this author rather favours the charger's plea, for he allows, that, "from the nature of the thing, and from the
" words of the act 1572, the enactment is limited to aliena-
" tions detrimental to the successors;" he adds, "yet the
" act has been explained into an absolute prohibition to feu." But by whom has such an explanation been given: If by any respectable writer in our law, let their authority be produced: If from decisions let them be pointed out.

The true meaning of the act 1572 will be best explained by the subsequent enactments in this subject. By 1585, c. 11. it is provided, that any incumbent, "who shall by feus, tacks,
" pensions, or charges of victual, for money, or any other dis-
" position, make their benefice in worse estate than at the time
" of their entry thereto, all setting and disposition shall be of
" none avail, force, or effect." So that even after the statute 1572, church-men had the power of setting their lands in feu, for such feus are declared null only when they render the estate worse than it was at the incumbent's entry.

At the restoration, in the 1606, bishops possessed the same privileges which they held before the abolition of Episcopacy; and it never was questioned that bishops had a right to feu their lands with consent of the chapter, without diminution of the rental. These are the only limitations in the act 1606,

e. 3. And inferior churchmen had the same authority over their benefices. Craig, Lib. I. dieg. 13. c. 17.

It has been argued, that the words in the act 1572, "in prejudice of their successors," do not mean the detriment of their successors, but their exclusion from the actual possession: But that interpretation is inconsistent with the acts 1585 and 1606, which supposes that churchmen may grant feus, provided they be not with a diminution of the rental, so that the limitation related to the detriment, not to the exclusion of the successors.

In the passage from Mr. Erskine already quoted, it is said, that the act 1572 has been explained into an absolute prohibition to feu. The suspenders have been called on to produce any authority either from any writers or the decisions which gives such an explanation to that act; but they have produced none. The charger has had no opportunity of making a general enquiry into the practice of the different presbyteries: But in the presbytery of Edinburgh, since the 1730, he has found several instances.

Thus, in the year 1736, the minister of the West Kirk, with the approbation of the presbytery, entered into a feu-contract, on which the feuar has since possessed. In the same manner, part of the glebe of Corstorphine was feued to Sir Robert Myreton of Gogar; and the presbytery, who made a report on this transaction, expressly say, that there are several instances of presbyteries feuing their glebes. In the 1768, part of the glebe of North Leith was feued under the authority of the presbytery, and a farther part in the 1778.

If, therefore, the reason of the thing, and the words of the act 1572, expressly limit the prohibition to feu, to alienations detrimental to the successor, the court will not be inclined to extend that prohibition to defeat the words and spirit of the law and practice which has followed on it.

A further ground of suspension has been founded on the want of the consent of the heritors. If the heritors imagine that a minister who has feued his glebe, has a claim for a glebe of a legal standard, they alarm themselves without reason. A minister who has feued his glebe, is in the eye of law in possession of it, and this would be a sufficient defence against such a demand; besides, the declaratory deed by the presbytery and incumbent ought to put an end to all fear on this head.

It has further been said, that the Duke of Athol, as patron, has an interest to object: The charger does not see what interest the patron can have, his right of administration on a vacancy, if it extend to the glebe, will affect the feu-duties.

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Argument for
the suspenders.

So far as the suspenders have been able to discover, the power of feuing out a glebe has never been authorised by any decision, though they admit, that in two or three instances, glebes do appear to have been feued out with the consent of the whole heritors of the parish. But these instances passed *sub silentio*. The suspenders are therefore to maintain, that the clergy of this country possess no such power. That it would be incompatible with the constitution of presbytery, and prejudicial to the interest of the clergy; and this they shall establish on two grounds, 1. From the general principles of common law. 2. From a due consideration of the statutes relative to the administration of glebes.

The clergy of the church of Scotland are stipendiary. Besides their stipends, they have, in terms of the statutes to be afterwards taken notice of, a title to a manse and a glebe, and according to Craig, “*In ecclesiæ patrimonio semper debet esse mansus qui clerico in cultum et victum sufficeret, &c.*” “*Rationem reddit glossa quod mansus tantum assignabatur unde frumentum et vinum ad clericum possit supeditari.*” The glebe is intended for the ease and accommodation of ministers, and is so little considered as part of the stipend, that in processes of augmentation the Court never permit it to be taken *in computo* by opposing heritors.

On the approach of the reformation, the Popish clergy feued out and set their manse in long leases, on payment of a *grasum*; and to such heights had this practice gone, that it became an object to the legislation to put a stop to it, which was done by the act 1563, which act was explained and amended by the act 1572. c. 48.

From these statutes, the object of the legislature was clearly that clergymen should possess a certain quantity of land for the purpose of cultivation, not only the spirit and narrative of the acts, but that clause which disables ministers from feuing, &c. that the glebe may remain free for the use and easement of future incumbents, shows this to have been their object. Further, when the minister is excluded by the feuar under the Popish clergy, it is not an equivalent in money that is provided, but a glebe; and it is clear from these statutes, the legislature meant that every clergyman should have a manse and a glebe of four acres of ground for his accommodation and comfort.

In the memorial for the chargers, the force of these statutes is endeavoured to be done away by taking hold of the expression, “*in prejudice of their successors*,” which was said to imply, that the prohibition was only in so far as the operations of the clergy were detrimental to their successors. But from the clause, it appears that there is a general prohibition of all fees
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without exception. To the prejudice of the successor means, to the exclusion of the successor, in contradistinction to the present incumbent, who during his own life may give up the possession. In short, every minister must have a glebe, and of this he cannot be deprived by his predecessor's substituting in its place a rent or feu-duty; nor can we suppose, when we see the anxiety of the legislature to give the incumbent land, that he can be deprived of it by the voluntary act of any of his predecessors.

In support of an opposite opinion, Erskine, B. II. tit. 10. § 61. has been resorted to. The opinion of Mr. Erskine proceeds on an erroneous construction of the statute: But he fairly admits that it has been explained in a sense opposite to his own opinion, and this is sufficient for the suspender's purpose.

The chargers have indeed stated some cases to prove, that the practice has been to feu glebes with the approbation of the presbytery. But these cases passed without challenge. In the latest case, that of North Leith, in the 1778, it appears that the ground was not a glebe, and the presbytery, in giving their opinion, did not seem to consider themselves as having power to feu out a glebe.

It matters not, however, what may have been done in two or three late cases, which never have been questioned; the suspenders are entitled to hold the practice to be in their favour, as admitted by Mr. Erskine in the paragraph founded on by the chargers.

As to the expediency of allowing the clergy to feu their glebes, the suspenders deny that it would be productive of any advantages to them considered as a permanent order of men, though it might to some of the present incumbents. Suppose, that immediately after the act 1572, the whole glebes had been feued out at double the rent, the ministers of the present day must have lost considerably. In short, it appears clear, that for supporting a set of men whose establishment is meant to be perpetual, being connected with the most essential interests of society, no sort of provision can be so properly settled as a certain portion of land, the value of which must keep pace with every alteration in the state of the country, and which at all times, whether the value of money shall rise or fall, will produce the same quantity of the necessaries of life.

Lord *Justice Clerk*—This is not a sale but a feu; the act of parliament is anxious to provide against the incumbent's selling to the prejudice of his successor; but where, instead of a prejudice, a real benefit arises from the feu, the act does not seem to apply. It does not appear what interest the he-

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Opinions

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ritors have to oppose the present feu; they may say that the minister is entitled to a house and a piece of ground in his natural possession, and that succeeding ministers may come to the presbytery and demand this; but they ought to consider that the minister gets for this glebe a permanent feu-duty of L. 36; a successor therefore cannot demand both a new glebe and this money-rent: the heritors will, at any future time, gladly exchange with him; they will give him a glebe on his conveying the feu-duty. His Lordship took notice of the great increase which would arise from the feu.

Lord *Esqgrove*—The Court cannot give this man a right to do what he could not have done by law; this requires an act of parliament. I incline to think that incumbents are not proprietors, and that none but proprietors can grant a feu. It was once made a question, whether the managers of Heriot's hospital could grant a feu, and it was decided, that, as proprietors, they might, for behoof of their charge. But an incumbent is in a different situation; if he can grant a feu, he may grant a lease to extend beyond his own lifetime, but he cannot; he has no part of the character of a proprietor in him; his property is *extra commercium*; all the acts of an incumbent, which extend beyond the period of his own incumbency, are reducible at common law; and there is no occasion for any statute to preclude an incumbent from exercising the rights of a proprietor: But here there is an act of parliament preventing incumbents from feuing in prejudice of their successors. This is not meant merely as to the interest of the successor; and that where his interest is not hurt the incumbent may feu; it is intended to prevent feuing in every situation; it is incompetent to feu, and accordingly the property is declared to remain in the possession of the incumbent, which is inconsistent with the power of feuing. The incumbent has therefore no power, nor have the presbytery any better right; their authority is of no use, at least the consent of the heritors is necessary; but I am doubtful whether even that would do without an act of parliament.

Lord *Swinton*—There are instances of feus, and there seems to be no doubt about an excambion.

Lord *Henderland*—I am of opinion with the Lord Justice Clerk: From the terms of the statute, I think, that before it was enacted, the clergy might have feued. Excambion may still take place with the consent of the heritors; the incumbent may also feu his glebe with their consent: The only question is, Can the Court supply that consent where the heritors refuse unreasonably to give it? And I think you are to judge in such a question, *tanquam boni viri*, on the propriety of the refusal.

Lord

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Lord President—This is a question of importance; I had a clear opinion upon it formerly, and I still retain it, notwithstanding what has been said by the Lord Justice Clerk. It is not in the power of the minister, even with the consent of the presbytery, or of the heritors, to feu. Is the glebe given to Mr. Robertson? no, it is given to the minister; the present minister leaves it to his successor; it belongs to the charge. The statute is salutary; it provides to the clergy ground to labour; there should be an increase of the ground allotted for ministers rather than a diminution of it. I have observed, that ground in the hands of the clergyman is always the best cultivated farm in the parish: He is from his education, and from many circumstances, the person most likely to overcome the prejudices of the country, and to introduce the improvements of agriculture. It has been said that this was a beneficial transaction; I am not at all clear of that proposition, nor is it possible for us to judge of that matter; at least I can easily conceive many instances, in which, had the incumbents come to this Court forty years ago for liberty to feu, and your Lordships predecessors had given that liberty for a feu-duty, which at that time appeared highly advantageous, it might not at this day have amounted to the rent which they would draw from the ground in tillage, in consequence of the improvements which have been made in agriculture; and if we take in the effects of the increase of manufactories of late years, we shall find the difference much increased; so that, so far from being favourable for the incumbent, the proposed plan may be quite the reverse.

Lord Justice Clerk—A minister is said not to be a proprietor, but merely an administrator; but the law thought him a proprietor, else where was the occasion for the act. The act was necessary for the purpose of restricting his powers of feu-ing. But his powers are restricted only so far as the statute restricts them. He may feu, therefore, whenever it can be done, without prejudice to his successors.

Lord President—If he be a proprietor he is a very limited one; he cannot transmit to his heirs; his creditors cannot adjudge; and he has no power by the act to feu: he cannot grant even a nineteen years lease.

Lord Dunfinnan—Of the opinion with the majority from the words of the act.

The vote being put, Sustain or repel, it, carried sustain, with the exception of the Lord Justice Clerk and Lord Henderland. The judgement was in these words: "Upon the report of Lord Dunfinnan, and having advised informations for the parties, the Lords sustain the reasons of suspension, suspend the letters simpliciter, and decern."

Judgment.
May 18, 1791.

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A reclaiming petition was presented, which was refused without answers.

For the Charger, Wm. Robertson, }
Suspenders, Ld. Advocate, } Adv.

G. Cairncross, }
Geo. Farquhar. } Agents.

Lord Dunfinnan Ordinary.

Home Clerk.

Vol. II. No. 14.

HEIR AND EXECUTOR.

II. REBECCA SPALDING and GRIZEL RATTRAY, Executors of
DAVID SPALDING.

AGAINST

GEORGE SPALDING of Glenkilry, Heir of DAVID SPALDING.

The interest of the reversion of the price of an estate sold judicially does not go to the heir of the apparent heir in the estate, but to his executor.

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II.

David Spalding stood infest in the lands and barony of Ashintully, and having contracted large debts, a process of ranking and sale was brought in the 1742. In the 1746 David Spalding died, and his widow, and Daniel Spalding his son, were made parties to the process; but no titles were ever completed in the person of the son. The lands were sold in the 1766, at the price of L. 8900 Sterling, and a bond for the price, payable to the creditors of David Spalding, was granted by Mr. Bruce the purchaser. The price exceeded the debts, so that a scheme of division was unnecessary, and the creditors obtained warrants without opposition, and received payment of their debts under that authority. The reversion, after paying all the ascertained claims, amounted to upwards of L. 3000 Sterling.

During the dependence of the process of ranking and sale, both the widow and son received an aliment under authority of the Court; and the son having died in the 1789, a title was made up in the person of George Spalding, by a special service as heir to David Spalding the father, who died last vest and seized in the estate; and at the same time Rebecca Spalding and Grizel Rattray, the other parties in this cause, who were nearest in kin to Daniel the son, were decerned executors to him, and a multiple-pounding being raised in the name of
Bruce

Bruce and his cautioners, and of those who had afterwards purchased the estate. The question agitated was, whether the reversion belonged to the heir or to the executors.

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II.

The Lord Ordinary "found that George Spalding, the heir of David Spalding, who was the last person of this family infest in the estate of Ashintully, is preferable to the principal surplus sum and interest arising from the sale of said estate in the year 1766, after payment of the whole creditors; therefore prefers the said George Spalding accordingly, &c."

March 9, 1791.

This judgement, in so far as it relates to the interest of the reversion, was brought under review of the Court by the executors of Daniel the apparent heir.

Had David Spalding continued in possession of the estate of Ashintully, and his son Daniel possessed upon his right of ^{Argument for the executors,} ap- parency, and had a title been made up in the person of the present heir, it is clear that the rents which had fallen due during the lifetime of the apparent heir would have belonged to the executors. The same must be the case with the interest of the price. The price is the surrogatum of the lands, and the title made up by the heir is a special service, the very same which would have been necessary to have connected him with the lands themselves. Had the estate been disposed of in lots, and as much sold as would have been sufficient for paying the debts, the rents of the lot remaining unsold falling due during the lifetime of the apparent heir, and unuplifted at his death, would have belonged to his executors; and it is difficult to figure a reason where the price, as a surrogatum for the lands, goes to the heir, why the interests of that price which corresponds to the rents should not go to the executors.

The heir says, that the lands being made over to the purchaser under the burden of the price, the price is of course heritably secured, and falls to him as heir. But supposing a sum equal to the price to have been secured by an heritable bond over the lands, the arrears of interest due at the death of David Spalding would have gone to his executors; and there does not appear to be any difference betwixt a sum secured upon land by an heritable bond, and land disposed under the burden of a certain sum. *Houston of Johnston, v. Stewart Nicolson of Carnock*, 28th January 1756.

It was further said for the heir, that there was no right of possession, nor *termini habiles* for it. There were no rents, nor any interest which, by the obligation, the purchaser was bound to pay to Daniel Spalding, or could have safely paid to him. But this must create a puzzle rather than carry conviction. Daniel Spalding, as apparent heir, had right to the interest

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II.



interest of the reversion; and in fact he was in possession, in virtue of the warrants for an aliment, which were granted by the Court. As to the tenor of the bond, if the objection founded on that be good, the reversion must have remained with the purchaser, or fallen to the crown as caduciarry, which is absurd.

Farther, it has been said, that the right which remained with David Spalding after the sale was only a right of reversion a right of calling the creditors to account, and of fixing his interest by a decree of the Court: that this *jus actionis* was *ajus unicum*, which, after his death, could be exercised only by an heir who had completed his titles. But the executors apprehend, that David Spalding, in the event of the sale's going on, had a right to the balance of the price after paying his creditors, and this descended to his heirs; and what is said of the *jus unicum* is a mere subtilty, and the same might be said in the case of a land estate.

It was also said, that an heir apparent could have no title to insist *active*; and as none but an heir who had completed his title by service could insist to have the reversion ascertained, none but an heir served could have right to the reversion either principal or interest. In answer to this, it was observed that an apparent heir, by the act 1695, could bring his predecessor's estate to a sale, and, if there should be a reversion, he was entitled to it. Ersk. B. II. tit. 12. § 61. In such a sale as the one in question there is no occasion for an active title in the person of the heir.

The heir further argued, that if the adjudging creditors had been directly in possession, no other than the heir served would have had a title to bring them to account, consequently whatever was in their possession must have belonged to the heir who first completed his titles, and an heir dying in apparenacy could have no right to it, neither could his executors have any. But supposing an action, calling adjudgers to account, to have been commenced during the lifetime of a person having a title, and that after his death a balance appears in the hands of the adjudger, the apparent heir would be entitled to the interest of such balance during his life, and the arrears would go to his executors. The same answer applies to two other cases that were put, one that of an improper wadsetter possessing till he is overpaid, and the other that of a trustee having funds in his hands after the purposes of the trust are executed; the apparent heir of the reverser or truster would be entitled to the interest of the balance.

It was also said, that David Spalding, had he been alive at the time of the sale, would have had right to an eventual sum only, that is, to the balance, after paying the creditors, as it should

should be ascertained by the final decree of division, and that consequently his heir could have no right to any thing else than to this undivided sum, which he could reach only by a service, and for ascertaining which a decree was necessary. But as to the indivisibility of the sum, there is an obvious difference betwixt the principal sum and the interest due upon it, and the decree is not necessary; the balance may be as well ascertained from the discharges of the creditors as by a decree of the Court. Should new creditors appear, no doubt they must be paid, but they will not be paid from the interest of the price; on the contrary, the principal will be paid from the principal sum of the price, and the interest of the debt from the interest due on the price.

The estate of Ashintully was last vested in David Spalding, who died in the 1744, and in the 1766, when the estate was sold judicially, it was in *hereditate jacente* of him, and Daniel Spalding his son, died in a state of apparency. It follows, that the right to the reversion could be taken up only by a person claiming in the right of David Spalding; and as in all questions of succession, *tempus mortis est inspiciendum*, and the only right in David at the time of his death was heritable, it is the heir alone of David that can claim the reversion. Accordingly it has never been doubted that it was the heir of the person last infeft in the lands who had right to the reversion of the price in a judicial sale, and the apparent heir could have no right without completing his titles. The only doubt has been, whether a general or a special service was required; and it has been decided that a special service was the proper form. (Home, July 21, 1742. *Stirling v Cameron*, Dict. vol. 3. p. 398.) And the executors have confined their claim to the interest, which is supposed to have fallen due during the lifetime of the apparent heir, though there is undoubtedly no room for any distinction betwixt the principal and interest of the reversion.

Argument for
the heir.

The general doctrine of law is, that mere apparency gives no active title, no interest in the *hereditas* whatever. But as it must take some time to complete titles, an apparent heir has been allowed to continue the possession of his predecessor; and this, proceeding from expediency, has been construed (though not without great difficulty) to import a right not only to the rents actually uplifted, but to those which have become due, and ought to have been received by the heir. This right, as it has been introduced *præter communes juris regulas*, cannot be extended to other cases, although they be similar, and much less to the present, which has no resemblance to them.

The right of David Spalding after the sale was only a right of reversion. There was no room for his right of possession
being

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being exercised while his property remained *in hereditate jacente*; his only right was that of ascertaining his reversionary interest by a decree of the Court, and until this was done, the heir could have no right to a shilling, either principal or interest. Without a service, an heir could have no active title to bring the process to a conclusion; and it follows, that none but an heir served can have right to that reversion, or to any part of it.

If the adjudgers had been in the actual possession of the estate, any balance in their hands, after paying their debts, must have belonged to the heir who first made up his title by service; and an intermediate heir dying in apparenacy, who had no title to sue the adjudgers, could have no right to any part, and consequently his executors could have none.

In like manner, an improper wadsetter possessing till he is overpaid, the heir, making up a title by service, can alone have right to the surplus, for no other has a title to pursue a declarator of redemption; or suppose a balance to remain in the hands of a trustee after answering the purposes of the trust, it is the heir who has been served that can call him to account, and consequently it is that heir only who can have any right to the balance.

The right of David Spalding was not to receive the yearly interest of the price from the purchaser, for the bond was taken payable to the creditors only. The right was to an eventual sum, depending upon the final decree of division; and the heir could reach it only by a service, which might have enabled him to bring the action to a conclusion.

The reversion must be subject to the debts of David Spalding, and a creditor appearing would be ranked in the first place on the interest in the hands of the purchasers.

The executors have referred to a decision, where the rents of a land estate, unuplifted during apparenacy, went to the executors of the apparent heir; but the ground of this decision was, that an apparent heir is held to be vested with a right to receive and uplift rents; and that the circumstance of payment being delayed, ought not to affect the interests of the executors: whereas, in the present case, it will not be maintained that the purchaser was bound to pay any part of the price to the apparent heir, either principal or interest, or that his apparenacy gave him a right to maintain an action against the purchaser. No balance had been ascertained, no scheme of division made out, and no service had been expedite in the person of the heir, and without it he had no title.

As to the alimentary payments, they must have been founded on the right of terce in the widow, or on the probability of a reversion;

reversion, or on the right of the heir to an aliment under the statute 1495, but on no vested right in the heir.

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The executors hold it to be clear, that interest, upon money heritably secured, falling due during the lifetime of an apparent heir, would fall to the executor of the heir; and they found on the decision 28th Jan. 1756, *Houston v. Stewart Nicholson*, that however is a very different case from the present, and could afford no rule for deciding it. But the heir does by no means admit that the executors of an apparent heir would be preferred to the interest of an heritable bond. The right of apparenacy entitles an heir to continue the possession of his predecessor, and to draw the rents of an estate; yet there is no lawyer who lays it down that this right entitles him to discharge the interest due on an heritable bond; and in practice it will be found, that although tenants pay their rents to an apparent heir, it has never been understood that the interest on an heritable bond could be discharged without a service. In the case referred to, this point was argued, but there was also a separate point pleaded, namely, that a service was unnecessary, the right to the debt being directly vested in Sir John Houston by the conception of the bond; and as the Court pronounced a general interlocutor, it is impossible to say whether the decision proceeded upon the one ground or upon the other; and in the very next case which occurred, *Mrs. Hamilton v. Hamilton of Dalziel*, 5th December 1760, when the case was recent, it was stated that the decision in the former case had proceeded upon the specialty.

AUTHORITIES.

Lady Houston, to whom the estate of Carnock had come under an entail, was taken bound to lay out L. 2026, (conveyed to her by the granter of the entail) in purchasing lands, or on good bonds, to the same series of heirs with the estate of Carnock. Sir John Houston, her son, succeeded to the estate in the 1750, and he had a title, as heir of entail, to demand the interest of the L. 2026, which remained unemployed in the hands of Lady Houston's representative. But he died in little more than a year without having completed any title to this sum, and without having received any part of the interest. The question therefore came to be, Whether Houston of Johnston, his executor, or the heir of entail of Carnock, was entitled to the interest which had fallen due during the apparenacy of Sir John Houston.

Houston v. Stewart Nicholson, 28th January 1756. Fac. Coll. cxxxii.

C A S E
II.

For the heir of entail it was pleaded, That Sir John died in a state of apparency with regard to this money. A service was necessary to vest it in him, and it was precisely in the same situation as if the money had been lent out on heritable security, or vested in land. The rents of lands, and the interests of bonds unpaid during the life of the apparent heir, do not go to his executors. A feudal right cannot be established without infestment; and the heir neglecting that form, and dying in a state of apparency, is no more to be regarded than if he never had existed; the next heir who completes his title by infestment, that title will be drawn back *fictione juris* to the predecessor's death, and will carry all right which was in the person last infest.

Thus an adjudication, *contra hereditatem jacentem*, carries the rents which fell due during the time of an intermediate apparent heir, Dict. of Decis. vol. I. f. 358; and thus adjudications upon a special charge carry bygones from the death of the predecessor last infest, 13th February 1740, Dickson: whereas, if these rents went to the executors, they could not be carried by adjudication, but must have been recovered by action against the executors.

The privileges of an apparent heir are *invita juris prudentia*; the progress of them may be seen, Dict. vol. I. f. 358. So far as he has uplifted the rents he cannot be challenged, but there the law stops: those unuplifted do not transmit. In the same manner heirship moveables, where no title has been completed, do not pass to the heir of the person neglecting to make up his titles and moveables which have not been in the possession of the nearest of kin, and to which no title has been made up, do not pass to the executors of the person neglecting. Stair, f. 199. 200. M'Dowal, vol. II. f. 324. and Erskine, f. 372.

For the executor it was pleaded, that there was no *feudum pecunie* constituted to which Sir John could have made up titles. He was creditor to the representative of Lady Houston, and could have pursued upon the obligation from his mother without any service. The case is similar to that of a contract of marriage, where, if the sum in terms of the contract be employed, it must be taken up by a service; but if not so employed, may be pursued for by the children as creditors, 2d February 1732, Campbell v. Duncan. 16th February 1737, Keith v. Coutts.

But admitting that a service was necessary, and that Sir John had died in a state of apparency, still the interests in question belonged to his executors. The apparent heir can force payment of the rents of the estate; his creditors can attach them by arrestment. 20th December 1662, Lady Tarfapie; and these powers can arise only from the right of property which is in him.

The

This right in the apparent heir is different from that of property; it arises, *ipso jure*, by the operation of law; it devolves without his knowledge, as when the heir is abroad, or an infant, 18th July 1727, *Sir Alexander Ogilvy v. Sir Alexander Reid*, and consequently this right passes to the executor of the apparent heir.

This difference between the right of property and possession is laid down by Stair, B. II. tit. 1. § 22. tit. 3. § 16. B. III. tit. 5. § 2. *M'Brear*, Stair, 1st July 1681, *President Falconer*, 20th November 1683.

The Lords preferred the executor.

For the heir, Ferguson and W. Stewart.
executor, Craigie, Lockhart, and Wallace.

Lord *Justice Clerk*. We had lately a case before us, in which the York-Buildings Company was concerned, where the sale had preceded the ranking, and the question was, whether the creditors were entitled to draw interest on their shares from the date of the sale; and you found that they were. Now, I apprehend that a reversion is heritable; and that a title to it is completed by a special service, what then does the heir carry? The interests of the parties are calculated as at the date of the sale. The scheme is made up as at that period. If there be a reversion, it belongs to the common debtor, or to his heir; but what is that reversion? It is a specific sum in pounds, shillings, and pence. It is an estate belonging to the common debtor, and upon his death, descending to his heir. Before the heir has completed his service, it belongs to him as apparent heir. He has no title to uplift the reversion without the service. But under the character of apparent heir he has a right to the yearly profits of the estate, and these transmit to his executors. This is the same case with the rents of an estate; it makes no difference that by the sale the estate has become a sum of money. The same was found in the case of *Houston*, where an heritable bond might have been taken up by the heir, the debt vested in the apparent heir and his executors, in so far as related to the interests which had fallen due during the apparenacy, and the executors were found to be preferable to the next heir. I consider this matter precisely in the same light.

Opinions.

Lord *President*.—The principal sum could not be touched without a service; but by this man's apparenacy, the interest goes to his executors. I remember, that in the case of *Houston*, Gray gave his judgment in this way on the general point without any specialty.

Lord *Dreghorn*.—There was no scheme of division made up in this case.

CASE
II.

Lord *Justice Clerk*.—It must be held as made up as at the date of the sale.

Lord *Swinton*, asked whether the rents of lands would go to the executors of an apparent heir.

Lord *Justice Clerk*.—So the House of Peers found in the case of Hamilton of Dalziel.

Lord *President*.—The principle of the decision in the case of the York-Buildings Company decides this one. A scheme of division may never be made out; all the debts may be paid off, and then the common debtor takes the reversion, without either a scheme or decree of division. Or should a scheme be necessary, did you not find, that at whatever time it is made up, the scheme must have its effect from the time of the sale. The necessary operation of the decree goes back to that period, or to the term of payment of the price. The reversion is a certain principal sum due to the common debtor at the date of the sale; and his heir is entitled without service to the interest of that sum. It has been said, that here there was possession; for my own part, I have been at a loss to distinguish betwixt a right to possess and actual possession. The common debtor in a sale may be kept out of his possession for a time; but still he has the right, and the circumstance of possession being withheld is not to alter the interest of the reversion.

Judgement.

June 8. 1792.

“ The Lords find, that the executors, the next of kin of
“ Daniel Spalding, the apparent heir, have right to the interests
“ of the reversion of the price that fell due, and were not up-
“ lifted or applied during his life.”

For the Execut. Ad. Rolland, } Advocates. J. Stormonth, } Agents.
Heir, Robert Blair, } W. M'Donald, }

Ankerville Ordinary

Mitchelson Clerk

Vol. X. No. 6.

HOMO.

HOMOLOGATION.

JOHN M'NAUGHTEN, and Others, Pursuers,

AGAINST

JOHN MURRAY Tenant in Bangour.

A submission signed by a person as taking authority for one of the parties was found to be sufficiently homologated by the parties adhibiting his subscription to the submission, although it was done after the submission was executed, and without any of the formalities required by the act 1681.

In an action of reduction of a decree-arbitral, at the instance of M'Naughton and others against John Murray, it appeared that the submission upon which the decree-arbitral had proceeded was entered into "by John Buchanan, for and in name of Duncan M'Naughton, John M'Kinlay, and Patrick M'Kinlay, as authorised by them on the one part, and John Murray on the other part."

C A S E
I.
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The pursuer maintained that the authority to Buchanan empowering him to enter into the transaction was a letter signed by the two M'Kinlay's only, who were brothers-in-law to Buchanan, while the defender insisted that the letter was also signed by M'Naughton; and it was admitted that the letter was destroyed by the arbiter at a meeting of all the parties, where both M'Naughton and the M'Kinlays adhibited their names to the bottom of the submission, though without any of the forms required by the act. But the submission had, previous to that meeting, been regularly executed with all the necessary forms, by Buchanan and Murray.

The question therefore was, whether the subscription of Buchanan, regularly adhibited and attested, with the subscription of M'Naughton and the M'Kinlays, as an act of homologation on their part, was sufficient to render them parties to the deed.

Lord Swinton.—Buchanan had no power from M'Naughton to bind him; and if so, the decree must fall to the ground. They all put their names on the submission; and unless we can sustain this as an obligation, we cannot sustain the submission. Opinions.

Lord President.—There was originally a letter authorising Buchanan, though we have no evidence of the precise terms of

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of it. But the submission was regularly executed by the person taking burden for the others, and they afterwards sign their names to the submission, in evidence of their having given their authority, though no doubt, if you require a formal writing from these persons, in order to bind them, there is no such writing.

Lord *Esqgrove*.—There can be nothing more common than for one person to take authority for another; and when either authority has been given previously or homologated afterwards, it is sufficient to support the deed. The consent or homologation may be proved *pro ut de jure*; and had M'Naughten been a party in this cause, and acknowledged his having given authority, I would have sustained this submission: But M'Naughten is now dead, what then is the next evidence? we have the names of M'Naughten and the others for whom Buchanan took burden put on the submission, and this must imply that they gave authority to Buchanan. Had they not given such authority we should have seen them come forward before the decree-arbitral was pronounced, and their not doing so must preclude them or their heirs from objecting now.

Judgement,

May 30. 1792.

The Lord Ordinary had pronounced a judgement, “repelling the reasons of reduction and suspension, and finding the letters orderly proceeded.” And the Court, of this date “adhered to the Lord Ordinary’s interlocutor, but found no expences due to either party.”

For the Pursuers, Archibald Fletcher,
Defender, David Cathcart,

} Advocates. John M'Nab,
Archibald Tod, } Agents.

Lord Gardenston Ordinary.

Sinclair Clerk.

Vol. X. No. 7.

HUSBAND

HUSBAND AND WIFE.

Messrs. HARVEY and FAWELL Merchants in London, and their
Attorney.

A G A I N S T

The Trustees of the late ARCHIBALD CHESSELS, HELEN CHESS-
SELS. (Mrs. SCOTT) his Daughter, and their Factor, and the
Creditors of ARCHIBALD CHESSELS.

A cautionary obligation by a married woman, with consent of her husband, found to be null, though she possessed a stock not falling under the *ius mariti*.

William Scott, son of James Scott merchant in Edinburgh, and of Helen Chessels, became indebted to Messrs. Harvey and Fawell, in the sum of 641 l. 3 s. of this there was L. 108 paid, and cautionary obligation granted by the father and mother for the balance, amounting to 533 l. 3 s. This deed proceeds on a narrative of the son's debt, and the obligatory clause of the deed is in these terms: "We James Scot merchant in Edinburgh, and Mrs. Helen Chessels of Chessels's Buildings, spouses, and I the said James Scott, as taking burden on me, for my said spouse, and we both, with one advice, consent and assent, without prejudice, of the securities, from the said William Scott, to the said Messrs. Harvey and Fawell, but in corroboration thereof, bind and oblige us, conjunctly and severally, and the survivor of us two, our heirs, executors and successors whatsoever, to content and pay, &c."

C A S E
I.

Apr. 15. 1785.

In May 1788 there remained due on this obligation a balance of about L. 100, and in order to force immediate payment of this money, arrestments were used in the hands of the commissioners of excise, tenants in certain subjects descending from Mr. Chessels, the father of Mrs. Scott.

In the competition which this arrestment gave rise to the principal question was, whether the bond granted by Mrs. Scott, a married woman, was effectual to produce diligence? But before proceeding to the argument on that point, it will be necessary to show the nature of that property which descended from Mrs. Scott's father.

Mr.

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I.

Mr. Cheffels on a narrative, that his daughter might, in the event of her husband's bankruptcy, be induced to grant deeds in prejudice of herself and her family, disposed his whole property to her "in trust for behoof of herself in life-rent, "for aliment and support of herself and her numerous family "of children, during her lifetime, and after her death for "behoof of her three sons, Archibald, William, and James, " &c. under the burden of L. 500 to each of the seven daughters then procreated, &c." and in the event of Mr. Scott's insolvency the deed says, "I hereby exclude and debar him, "the said James Scott, his *jus mariti*, and him from the administration and management of my said estate, &c. and I declare that the same shall neither be liable nor subjected to "the payment of his debts, implementing of his deeds, nor "affectable by the diligence of his creditors," and in that event Mrs. Scott is empowered to act without the consent of her husband, "but with consent of a quorum of the trustees after "named to grant and subscribe all deeds, and to commence "and transact all bargains and transactions concerning the "disposal and management of my said estate. And it is declared to be necessary that the trustees shall concur and consent to all deeds to be granted by Mrs Scott." Mr. Scott's *jus mariti* (in so far as extended to these subjects) was at an end long previous to the executing of the cautionary engagement for the son, in consequence of his bankruptcy.

The arresters contended that the subjects were vested by Mr. Cheffels in his daughter and her children, and consequently that they were attachable for her debts; and it was said that although the subjects were given to her in life-rent, yet as there is no prohibition to contract debt, her contractions must be effectual. With regard to the clause in the deed requiring the consent of the trustees to Mrs. Scott's deeds, it was admitted that the want of their concurrence might invalidate a conveyance of the subjects, but it was denied that the clause could affect the diligence of her creditors; and it was observed that the subjects being directly conveyed to her, so that she was enabled to consume the rents, it would be absurd to deny her creditors a right of attaching them for debts which she was not restrained from contracting.

But the cause did not turn upon these points; and on the effect of the obligation by Mrs. Scott the following argument was maintained:

Argument for
Mrs. Scott.

The obligation by Mrs. Scott is null and void. 1st, As not being judicially ratified. 2^{dly}, As being a personal obligation granted by a married woman.

Erskine (B. I. tit. 6. § 25.) considers personal deeds by a married woman as *ipso jure* void, her person being *quodammodo*,

ammado, sunk in that of her husband, and consequently they do not acquire force even by a judicial ratification. Feb. 18, 1663. BIRTH.

CASE

I.

This rule suffers exceptions, where there has been a separation; where the wife is *præposita negotiis*, or where she has a separate stock. In this last case Mr. Erskine lays it down that the wife can lawfully bind herself in so far as the separate estate extends; and he refers to the case of Nicolson v. Arthur, observed by Dirleton, No. 184; but there, the decision proceeded on this ground, that "the money had been borrowed and employed for the use of the wife." And wherever a married woman having a *peculium*, has been found liable upon a personal obligation, the decision has uniformly proceeded upon the specialty, that the money or furnishings were applied for her behoof.

"A wife was found liable for drugs furnished to her and her children at her desire, she having a separate estate left by her father for her aliment, wherefrom her husband was excluded, and he at the same time bankrupt, and out of the country, Stair, 19th December, 1667. Gairns v. Arthur. A lady being settled in a separate aliment, any furnishings made by merchants, &c. to her, found to bind her personally and to affect her aliment, *Harcus (stante matrimonio)*, 6th July 1688, Robin v. Countess of Southesk. The nullity of a bond granted *stante matrimonio*, being objected, answered, though it bears borrowed money, the true cause was for marriage clothes. The Lords sustained the bond *quantum in rem reversionem*, without necessity of a distinct process for the price of the furnishing. Stair, Fountainhall, 8th November 1677, Sinclair v. Richardson."

In the case of borrowed money, where no such specialty occurred, action has never been sustained. "A wife had a considerable aliment modified to her by the privy council for the entertainment of her husband and her family, whereof the whole managery (because of her husband's weakness) was committed to her, and her discharges declared sufficient, having granted bond for borrowed money during the marriage. The Lords, though the validity of the marriage was much doubted, by reason of the husband's natural fault, yet refused to recede from the known principle of law, and found her not liable for the sum. Fountainhall, Forbes, 15th November 1705, Duncan v. Lady Drum. An apprising led on a bond of borrowed money, granted by a husband and wife found null, though it was argued, that a woman, with her husband's consent, can bind herself effectually to grant security upon her lands; and her subscribing the bond, though it cannot bind her personally, must at least be equivalent to a consent, that the creditor, upon the husband's obligation, should have access to apprise

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the

CASE

I.

" the lands. Durie, 30th January 1635, Mitchelson v. Mowbray, July 1625, Irvine v. the representatives of Dougal Hope (husband), 3d February 1716, Douglas v. Hamilton."

Argument for
the creditors.

With regard to the want of a judicial ratification, this form is not necessary for securing a grantee; the only purpose of it is to bar vexatious actions of reduction, brought on the pretence that the deed was obtained from force or fear. When there has been neither force or fear used, the deed is good without the ratification; and here it has not even been alledged that there was either, Erskine I. 6. 36.

As to the objection, that a personal obligation by a married woman is null, it does not take place where the wife has a separate stock; for, where that is the case, she may grant personal obligations, which will enable her creditors to affect her stock, Erskine I. 6. 25. It has been alledged, however, by Mrs. Scott, that this exception does not extend to the case of borrowed money: But there is no authority for saying so, no exception is made, and the very question from Dirleton, upon which Mr. Erskine founds, was one upon a bond of borrowed money.

The decisions quoted by Mrs. Scott, apply to cases where there was no separate stock; and in a word, the writers upon our law are clear, and the decisions of the Court have uniformly proceeded upon this principle, that where a married woman has a separate stock, she is entitled to contract debt, or borrow money, so as to affect that separate stock.

Add to this, that the bond in question is granted for a debt due by William Scott, one of her sons; and as the subjects are conveyed for behoof of the children, this obligation is in reality following furth the purposes of Mr. Cheffell's settlement:

Opinions.

This question came before the Court on informations, when their Lordships delivered the following opinions.

Lord Justice Clerk.—If the debt be good against Mrs. Scott the arrestment will be an effectual attachment of the rents, for these under the liferent are her own proper estate. But with regard to the debt, the general rule of law is, that a married woman can grant no personal obligation: Such obligation is null and void, because in law a wife has no person. It is said, that when she has a separate stock the case is different; but this is erroneous; she may indeed convey that estate; but the only way in which a personal obligation can be made good, is by showing that the money has been in *rem versum* of the wife. In the present case, the bond is merely a bond of cautionry for her son, the money was not therefore in *rem versum*, and the obligation is null.

Lord

Lord *Eskgrove*.—My opinion is fixed ; an obligation by a wife is null, unless where the money can be shown to be in *rem versum*. Where a wife has a *peculium*, she may sell or dispose of it. But the deed in this case is not a conveyance of her stock, it is a mere personal obligation, and the worst of all personal obligations, a cautionary one.

Lord *Swinton*.—There are three cases where a wife can bind herself ; 1. Where she is *praposta negotiis*. 2. Where the money is in *rem versum* : And, 3. Where the deed is not to take effect till after the dissolution of the marriage. This is neither of these cases.

Lord *President*.—Chessels' settlement is by no means entitled to favour. It is a settlement in trust to the wife for herself and her family. The purpose of it is to withdraw the estate from the reach of creditors. In the obligation founded on, the husband is taken bound, he takes burden for his wife ; he is therefore liable for the debt. The son is also liable : but the wife is not. The only ground of debt, against her is a mere personal obligation ; and it is well established in our law, that such obligations by a wife are null. The men of business who advised this ought to be liable in damages for advising a null obligation. They ought to have bound the estate ; and then the security would have been effectual.

There is another view of this case. The settlement gives the estate to the wife and the children in life, for their support and aliment. The son, who is bound to these creditors, has right to a share of this aliment, or, in other words, to part of the rents of the subjects ; how far then is he entitled to this, independent of his creditors ?

The Lords, on considering the informations for both parties, found the diligence proceeding upon Mrs. Scott's obligation ineffectual, and preferred her and the creditors of Mr. Chessels (for whom appearance had also been made) to the sums in the hands of the arrestees.

Judgement.
Feb. 21, 1791.

For the creditors, William Craig, } Advocates. Arch. Crawford, } Agents.
Mrs. Scott, Geo. Ferguson, } Will. M'Ewan, }

Lord Dunfermline Ordinary.

Sinclair Clerk.

Vol. II. No. 1.

IMPLIED OBLIGATION.

I. JAMES DINNISTON Manufacturer in Glasgow, Pursuer;

A G A I N S T

WILLIAM HARKNESS Carrier between Glasgow and Carlisle,
Defender.

A carrier is not liable for goods going beyond his place of destination, if the goods were delivered by him to the next carrier.

C A S E
I.

Mr. Denniston having occasion to send goods to the value of L. 18. to Mr. Worthington at Oldham near Manchester, the parcel was properly directed and delivered to Harkness; and it was entered in the way-book, in the same terms with the direction.

Harkness is a carrier only betwixt Glasgow and Carlisle, and on his arrival at Carlisle, he delivered the parcel to Wilson the carrier betwixt that place and Manchester; it was properly entered in Wilson's way-book, and Harkness received from Wilson eight pence as the dues of the carriage betwixt Glasgow and Carlisle. This parcel was lost in a subsequent stage and never was received by Mr. Worthington.

Mr. Denniston brought an action against Harkness for the value of the parcel, founded on what was said to be mercantile practice in similar cases. In this action a proof of the practice was allowed; and the import of the proof amounted to this: That it was the understanding of merchants, as well as of carriers, that the carrier who undertook the charge of parcels to a place beyond his destination, was liable for the value in case of the parcels being lost, in whatever part of the course that loss might happen; and several instances were given where carriers paid that loss, trusting for their reimbursement to their claim of relief against the carrier to whom the goods had been delivered, and under whose charge they were, when the loss happened. This evidence was given by those concerned in the Newcastle waggon, and by merchants and manufacturers, who had frequent occasion to send goods by inland conveyance.

June 1. 1790.

Upon advising this proof, the Lord Ordinary, in respect of it "decerned against the defender for the value of the goods
"libelled,

"libelled, and found expences due." This judgment was brought under review by the defender.

C A S E
I.

The proof which has been led is incompetent; the doctrine it tends to establish is contrary to law, it is contrary to practice, and would be fatal to inland commerce. Argument for the defender.

The witnesses do not depone to the practice of merchants but to their own opinions as individuals; they all swear to what they "consider to be law." Had the opinion of lawyers been produced, it would have been rejected, much more must the opinions of merchants clerks and carriers book-keepers: The production of this evidence is highly improper.

To show that the action was not founded on practice, the defender referred to the evidence, where it was said, that such actions were brought against the carrier in whose hands the loss happened; and to a case where Rogerson, a merchant in Manchester, pursuing an action of this kind, brought his action, not against the Manchester carrier to whom he had delivered the goods, but against Hislop the carrier, by whom they were lost.

It has commonly been said that the edict *nauta capones stabularii*, must be applicable to carriers, and the defender may allow that it ought where goods have been lost while under the carrier's care; but there is no principle upon which he can be made liable while the goods are under the custody of another responsible person, to whom it was his duty to deliver them. Ulpian, L. 1. §. 1. ff. *nauta caup. Stab.* says, that the edict was equitable, because it was in the power of those against whom it was directed to undertake the charge or not. But carriers are in a different situation, they must undertake the charge, Viners Abr. Vol. II. p. 344. as to the conspiracy with thieves, which, it is supposed may take place amongst those against whom the edict is directed, and is another ground upon which it is defended; neither can that apply to the case of the defender after the goods are out of his possession; and indeed with the Romans the innkeepers were not liable after the goods were fairly out of their custody.

By an act of William and Mary, Stat. 3. c. 12. §. 24. no carrier is allowed to take more than a fixed and usual rate for carriage under a penalty; consequently, a stone weight carried to the place of the carrier's destination must be charged precisely in the same way with an equal weight which is to go forward to the utmost limits of the kingdom, and therefore no demand can legally be made for the risk, which according to the pursuer, the first carrier must run in passing the goods through the subsequent stages of its progress; and surely the conclusion is, that in law no such risk can be understood to lie on the first carrier.

The pursuer's doctrine is equally inexpedient as unjust; for should a carrier not be exonerated by delivering goods to responsible

C A S E

I.

Argument for
the pursuer.

sible persons, and at the same time not at liberty to refuse the employment, they must either stipulate an arbitrary premium for the risk, or give up their employment; and either of these would have prejudicial effects upon commerce.

The defender received a parcel, directed to Oldham, near Manchester, and this direction, did in mercantile usage, constitute an obligation for the value of the parcel, if lost before delivery; and the entry in these terms in the way-bill established the existence and extent of the obligation, and that, whether he travelled to the place of delivery, or executed the obligation by the employment of other carriers. Upon the evidence, the pursuer observes, that it establishes, most unequivocally, the general practice; and as it is a practice which is said to bear hard upon carriers, that it must have in some instances been opposed, had it not been an established general rule. That the evidence was a decisive proof of the agreement betwixt the parties, as it is certain that the transaction must have been entered into upon the common understanding of those engaged in the business. That as to the risk, it appears from the opinions of the witnesses, that the price of carriage bears a proportion to that risk.

There is a commentary upon the edict *nauta capones stabularii*. But this action is not laid upon that edict alone, it is also laid upon the contract betwixt the parties. The defender has referred to Viner's Abridgement, in order to show that by the law of England a carrier is not at liberty to refuse a parcel when the hire is offered; but the decision says, no more than that if the cart be not full he may be compelled to admit such goods as do not overload it; and in Viner's collection the actions against carriers are laid upon the "common usage of the realm," importing that the rules which practice has introduced govern the obligation, betwixt them and their employers.

The question betwixt Jonathan Rogerson, a manufacturer in Manchester, and one Hislop a carrier, does not show the understanding of the English manufacturers, and that they bring their claims directly against the person by whose inattention, or by whose delict the goods were lost; for it appears from the account given by Mr. Niel, who was Rogerson's rider at the time, that the action was brought against the Scotch carrier, at the desire of the Manchester carrier.

It might further be urged, that the rule which has been established by the evidence in this cause contributes to the security of property and the facility of recovering the value when lost, as a departure from it would entitle a carrier to discharge the obligation upon himself, by delivering the goods to any person he thought proper; and as hitherto the carriers have suffered

no hardship, it is an obligation that should not be rashly taken off.

C A S E,
E.

Opinions.

Lord Eskgrove.—The obligation upon a carrier must be regulated by the extent of the hire. There was no contract to deliver the goods at Manchester. In the case of a shipmaster who engages to deliver goods at Rotterdam, if he deliver them to another during the voyage he still continues liable to the owner; but in this case goods directed to Manchester were put into the hands of the Carlisle carrier, and it is contrary to law and to justice to imply an obligation upon him to insure their carriage to Manchester; suppose they had been directed to London, and had been delivered to two or three different carriers in their progress, must this Carlisle carrier have been liable for the loss of the parcel, although that loss had happened while the goods were under the charge of the last carrier, and although the Carlisle carrier received no more than the carriage from Glasgow to Carlisle? As to the evidence concerning the practice, if such be the practice, it is a wrong one; but, at any rate our ideas of the law are not to be taken from that source, the witnesses are chiefly the rivals of this carrier, or merchants who have an interest that he should lose his cause: But the evidence relates principally to the practice that is followed by the Newcastle-waggon, and there it may be very proper, because the business is carried on by a company, who are carriers the whole way, so that although the goods do apparently change hands at different stages, and are put into new way-bills, yet it is the same company all along who are accountable for any loss that may happen. This far I would go in making the sender liable; he must fix the goods in such a manner upon the next carrier as will give the pursuer an action for indemnification.

Lord Henderland.—The hire of the carrier is clear evidence that the extent of his obligation is to Carlisle and no farther.

Lord Dreghorn.—I was stumbled with the proof; it is not of matter of opinion, but of matter of fact. There are several cases mentioned similar to the present in which the carrier paid the loss.

Lord President.—With respect to the depositions in this case, although they had established more clearly than they do that there were cases similar to the present where the value of goods had been recovered from the first carrier, I should have been inclined to attribute them to a desire in the carriers not to disoblige their employers, and a confidence at the same time in their fellow-carriers; but if it be the practice (and it should be

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I.



be enquired into), that a carrier in this man's situation is liable for the goods until they are delivered at the place of destination, let it be solemnly fixed, and carriers will then proportion their hire to their risk. It does not seem to be the practice in England, as appears from Burrows Reports, 2209; where a carrier was found liable for every risk, even for that from robbers, because a robbery may be collusive; but he was liable no longer than when the goods were in his own custody.

The Lord Justice Clerk coming into Court from the Outer-house at this time, the Lord President asked his opinion: His Lordship said, that it was against every principle of law and common sense to subject this carrier to the loss, unless his hire be equal to his risk. He is a Carlisle carrier, he goes no further than Carlisle, and therefore he is not obliged to carry the goods further. He is no doubt bound to fix their delivery upon the Manchester carrier, so as to give the owner action for them; and if he does not, he is liable *ex culpa*.

The question being stated, whether the practice should be inquired into, it was thought hard to force this carrier into such an inquiry, when there was grounds for deciding in his favour without it.

Judgement.
Jan. 15. 1791.

The Lords altered the judgement reclaimed against, sustained the defences, and affoizied the defender.

Against this judgement a reclaiming petition was presented by the pursuer; upon advising it the following opinions were delivered.

Opinions.

Lord Eskgrove.—Surely this man can be no further liable than to put the goods into the hands of a creditable carrier. There may be a specialty here, arising from the delay in giving the necessary information to the pursuer.

Lord Justice Clerk.—It is said that inconveniences may arise from the decision which has been pronounced: there can be no inconveniency. There is no possibility of overturning the principle of the decision. The interlocutor cannot be altered unless the pursuer could show that the defender was *in culpa*. I am for adhering.

Lord Swinton.—No carrier will continue in his business if you reverse the interlocutor.

Lord Dregbourn.—I had difficulties before, and I have them still: There is no proof on the part of the carrier; but the proof on the part of the merchant is very strong.

Judgement.

Their Lordships refused the petition on the principal point, but remitted to the Lord Ordinary that his Lordship might in-

inquire into the fact; and if it appeared proper, allow a proof of misconduct on the part of the carrier.

C A S E
I.

For the Pursuer, R. Hodgson, } Advocates. R. Jamison, W. S. } Agents.
Defender, R. Corbet, } W. Corbet, }

Lord Rockville Ordinary.

Sinclair Clerk.

Vol. II. No. 16.

INSTRUMENTARY WITNESS.

* I. JOHN CARRUTHERS, &c. Pursuer;

AGAINST

ELIZABETH GRAHAM, Defender.

Whether will the evidence of the instrumentary witnesses be received to cut down a deed apparently regular?

IN the reduction of a deed granted by John Carruthers, one of the witnesses swore, that not having seen the granter subscribe, he hesitated to sign; upon which the granter desired him to sign, and told him that no harm would happen to him. The other witness swears to his having been present when the deed was read over by Elizabeth Graham differently from its real contents.

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I.

The Court, on other grounds, repelled the reasons of reduction of the deed; but upon the effect of these depositions, the following opinion was delivered by Lord Eskgrove. Instrumentary witnesses need not be informed of the contents of the deed to which they are witnesses; here they acknowledge that their subscriptions are real ones; but one of them says that he does not recollect to have seen the granter subscribe. It would be dangerous to hold this as a proof that he actually did not see the granter subscribe. I must rather hold his

* It seems to have been from the doubts expressed in this, and in some other cases at that time depending before the Court, that their Lordships were induced to order a hearing in presence in the question *Frank v. Frank*, upon the question, whether instrumentary witnesses could be examined to prove informalities in the execution of the deed; and it is on that account that this case has been inserted.

IMPLIED OBLIGATION.

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memory as fallacious; for signing without seeing the granter subscribe is a crime; the Court will not hold a man to be guilty of a crime where it has not been expressly proved against him, and want of recollection cannot be a proof of it. Then comes the testimony of the other witness, who, from his own confession, was art and part in deceiving the granter of the deed; but I cannot give credit to this deceit upon the authority of one witness only, (though he were a person of the best character,) when the consequence must be to reduce a regular deed; and, upon the whole, I incline to repel the reasons of reduction.

For the Pursuer, Robert Corbet,	} Advocates.	John Dickson, W. S.	} Agents.
Defender, Rob. Dalziel.		Bayne Whyte, W. S.	
Lord Alva Ordinary.		Menzies Clerk.	

VOL. X. No. 8.

I N H I B I T I O N.

In the Ranking of the Creditors of HUGH ROSS of Kerse.
I. HENRY PEARSE, Esq; of Bedale, &c.

A G A I N S T

Mrs. ELIZABETH ROSS, Widow of the late HUGH ROSS of Kerse.

An objection to an inhibition, that it stated the summons upon which it proceeded, to have been libelled only, when in fact it had been executed, and was a depending action, overruled.

C A S E

I.

AN inhibition at Mrs. Ross's instance against Hugh Ross of Kerse, was objected to, as not mentioning that the "*depending action*" was shown to the Lords, but only the libelled "*summons*, which, without the execution, does not make a "*depending action*." The fact was, that the summons had been executed two days before presenting the bill, and the execution was on the back of the summons, so that it must have been produced to the Lord Ordinary, and the bill bore "*fiat ut petatur*, because the Lords have seen the dependence."

It was argued for Mrs. Ross, that the object of the law was merely to have a depending action before inhibition should be

be

be allowed, Erskine, p. 370. Bruce, 9.—That instances occurred of more important objections to inhibitions having been overruled, Dictionary, Vol. III. *voce* Inhibition. And that the circumstances on which the decret was pronounced in the case of Peat v. McEwan*, were so different, that the judgement in that case could not serve as a precedent for this.

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I.
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The Lord Justice Clerk had, in a former stage of the ranking where this objection had been stated by another creditor, repelled it, and the objection was now overruled by the Court. It was thought that the expression here used could not alter the nature of things. The summons had really been executed.

|                              |   |                   |   |                    |
|------------------------------|---|-------------------|---|--------------------|
| For the pursuers W. Honyman, | } | Advocates.        | } | Agents.            |
| defender A. Abercromby,      |   |                   |   |                    |
|                              |   | A. Swinton, C. S. |   | Bayne White, C. S. |

Lord Swinton Ordinary.

Sinclair Clerk.

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\* As this decision has not been collected, it may be proper here to state the circumstances of it.

M. Peat, in the character of trustee for a bankrupt, raised a horning on a bill of exchange, which had been protested, and the protest registered. The deliverance upon the bill of the horning was *apud* Edinburgh 14th April, 1785, "*fiat ut petetur*, because the Lords have seen the registrate disposition." In the horning itself, the because was altogether omitted, and even the narrative of the horning did not bear that the registered protest had been produced. The objection was at first repelled. "In respect it appeared from the horning that the same had passed upon a bill, and that the titles in the person of the raiser of the horning were produced and shown to the Lord Ordinary on the bills." But afterwards this judgement was altered, and the objection sustained; and this appeared to have been founded on these grounds: 1. That the bill of the horning did not bear that the registered protest had been shown. 2. That the deliverance upon the bill only bore, that the Lords had seen the registered disposition by the bankrupt to the trustee, without mentioning either the bill or the protest on which the horning proceeded. 3. That the horning itself wanted the because altogether, and even the narrative did not bear the production of the registered protest.

## INSURANCE.

I. WILLIAM CUNNINGHAM and Company, Merchants in Glasgow, Pursuers;

AGAINST

LAURENCE CRAIGIE and others, Merchants in Glasgow, Insurance Brokers, Defenders.

Underwriters on a policy of insurance from one port to another, with liberty to call at a third port "to join convoy," are not liable for a loss occurring before the vessel's arrival at the port where she was to join convoy; it being proved, that in case of her arrival at that port, she was to have unloaded part of her cargo.

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IN January 1783, James Black, agent for Robert Paton and John Banks, wrote the following letter to one of the defenders: "Please make insurance for account of Mr. Robert Paton, Mr. Banks, or whoever else may be concerned upon goods, say, indigo and rice, at and from loading thereof at Georgetown, near Charleston, South Carolina, on board the Batchelor, master, until the said goods are landed at St. Thomas, allowing the said Batchelor to call at Charleston for convoy, and stipulating a return of premium for the same. Mr. Paton's letter is dated 12th December, and advises, that the vessel was loaded and lying in the river of Georgetown on the morning of the 4th, and that if she sailed on that day, or on the 5th, he is confident she must have bore away, as the wind was north-west the two days following. He also observes, that he had obtained the most satisfactory passport from Commodore Swiney, senior officer at Charleston, for their security in proceeding from thence to Georgetown, and returning back to Charleston; and that as she appeared the sole property of Mr. Banks, who resided at Georgetown, she had a set of American papers, which would secure her from condemnation on their part. Mr. Paton therefore thinks the only probability of loss is by sea-risk, or English capture, as he is doubtful whether Commodore Swiney's passport may operate any further than from Georgetown to Charleston. Under these favourable circumstances the insurance ought to be very moderate."

In

In consequence of this letter insurance was made, the underwriters became bound to insure all and whatsoever goods, &c. “beginning the adventure upon the said goods and merchandize, at and from the loading thereof, on board the said brigantine Batchelor at Georgetown, in the province of South Carolina, and to continue and endure until the said brigantine Batchelor, with the said goods and merchandize, shall safely arrive in the island of St. Thomas (with liberty for the said Batchelor to call at Charleston and join convoy), and until the said goods are there safely landed. The said goods is and shall be valued as follows: rice at 25 s. *per* hundred weight, and indigo at 2 s. 6 d. *per* pound.” The premium was 20 guineas *per* cent. to return eight guineas *per* cent. if the said Batchelor fails with convoy and arrives.

Georgetown, from whence this vessel sailed, was subject to the States of America, and she was cleared out for the island of St. Thomas, a neutral port. She was American built, and the sole property of American subjects; as was sworn to by Banks, one of the owners, before she was cleared out.

After failing from Georgetown, this vessel steered her course for Charlestown; and on the 10th December 1782 she was captured by an American privateer, when she was standing in close for the harbour of Charleston. She was immediately condemned as a lawful prize, and on the 23d of that month she was sold by the capturers.

It appears from the proceedings in the American court, that the commander of the insured vessel informed the hands on board “that he must go off the bar of Charleston, to see whether the fleet had sailed or not; and if a certain ship was there, he was to discharge half his cargo on board the said ship, and then proceed under convoy of the fleet which lay off the bar.”

Besides the above policy, another had been opened in London; and for the space of five years no demand had been made by the insured, in virtue either of the one or of the other policy. But the pursuers having obtained a decree against the insured for payment of certain debts, arrestments were used in the hands of the insurers; and the question came to be, whether any claim lay against the insurers upon the foresaid policy in consequence of the loss of the Batchelor.

When this cause came before Lord Dreghorn as Ordinary, his Lordship, on the 13th July 1789, disallowed the defenders; and on the 5th August following, his Lordship pronounced a judgement to the same purport, in these words: “Finds, “That when the policy in question was entered into, the Danish port of St. Thomas in the West Indies was a neutral port, but Charleston was not, being occupied at the time by the

Aug. 5. 1789.

## C A S E

1.

“ the troops of the king of Great Britain, then at war with  
 “ the United States in America. Finds, That by the time of  
 “ the policy St. Thomas was the only port of destination;  
 “ and that as to Charleston, as no more was expressed, so  
 “ no more was implied, than that the vessel might call there  
 “ and join convoy if one could be got. Finds, That if liberty  
 “ had been granted to land any part of the cargo at Charleston,  
 “ the risk would have been different and much greater. Finds,  
 “ That the vessel was captured by an American privateer after  
 “ she had passed the bar, without which the ships of war lie,  
 “ and was in the direct course to the harbour of Charleston;  
 “ and that she was seized, and afterwards condemned, singly  
 “ on account of the intention to land part of her cargo at  
 “ Charleston, of which intention evidence was brought in the  
 “ process of condemnation. Finds, That when the policy in  
 “ question was entered into, the insured either did intend to  
 “ land part of the cargo at Charleston, or did not. Finds,  
 “ That if they did, there was a concealment of a material cir-  
 “ cumstance sufficient to void the policy. Finds, That if they  
 “ did not, there was an alteration of the voyage, which va-  
 “ cates the policy *ab initio*; and thus it would be of no conse-  
 “ quence, although (which however appears not to have been  
 “ the case) the vessel had been taken before she arrived at the  
 “ point of separation; because, in cases of alteration, mere  
 “ intention is sufficient, though in cases of deviation it is not;  
 “ therefore sustains what has been pleaded for the defenders,  
 “ which resolves into the above-mentioned alternative de-  
 “ fence, of new assailzies the defenders, &c.” It was said by the  
 pursuers there were two mistakes in this interlocutor in point  
 of fact: 1. That the vessel was captured after she had passed  
 the bar; whereas she was captured without the bar. 2. That  
 the condemnation proceeded singly on account of the inten-  
 tion to land part of her cargo at Charleston; but the circum-  
 stance sworn to by the crew was an intention on the part of  
 the master to discharge part of the cargo on board of a particu-  
 lar ship without the bar.

On advising a petition and answers against this judgement,  
 the Court (June 2. 1790.) adhered to the interlocutors of the  
 Lord Ordinary. The question was then brought before the  
 Court on a reclaiming petition and answers; when the follow-  
 ing argument was maintained.

Argument for  
 the pursuers.

The underwriters have urged two defences: 1. That there  
 was an improper concealment of the circumstances. 2. That  
 there was an alteration or deviation from the voyage meant to  
 be insured.

I. The first defence resolved into this, that the underwri-  
 ters were led to believe, that the Batchelor, an American vessel,  
 cleared

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cleared out from Georgetown, an American port, and bound for the neutral island of St. Thomas, was not intended to perform a voyage which could in any respect render her liable to be seized by an American privateer; and this being a risk which the vessel really run, the underwriters ought to have been apprised of it.

But there was no such concealment; and the underwriters must have known, that, in consequence of the vessel's connection with the British fleet off Charleston, she was liable to be captured by the Americans.

By the express terms of the policy, the Batchelor had liberty "to call at Charleston and join convoy." Charleston was then in possession of the British, and the convoy she was to join was a British fleet and the underwriters having agreed to these terms, became liable for the risk arising from the connection with the British fleet. Had the policy been known of in the dominion of the United States it would have afforded ample ground of condemnation, or had it been opened in Georgetown, their vessel would not have been allowed to sail; it would at once have been known what kind of trade she meant to carry on: and will it then be believed that the insurers, merchants in Glasgow, men of good sense, and of information concerning the affairs of America, were deceived by the insured, and were led to believe this to be merely a trading voyage from Georgetown to St. Thomas.

The goods consisted partly of rice, an article adapted for the use of the British forces, the underwriters knew of the passport from the British commander at Charleston, and they were told that the owners were hopeful there would be no chance of American capture, as the vessel appeared to be American property, and was possessed of a set of American papers; however small therefore the risk was, it was one which was brought under the consideration of the underwriters.

From these circumstances it does not appear that there was any concealment on the part of the insured, nor any deceit practised upon the underwriters.

There is an English case, which though not precisely similar, will, from the doctrine laid down by the respectable judge by whom it was decided, afford an answer to some of the arguments maintained by the underwriters. Douglas's reports, p. 251. *Planche, &c. v. Fletcher*. "Planche and Jac-  
 "query, merchants in London, insured goods on board the  
 "Swedish ship called the Maria Magdalena, lost or not lost,  
 "at and from London and Ramsgate to Nantz, with liberty  
 "to call at Ostend, being a general ship, in the port of Lon-  
 "don for Nantz. The defendant, undertook the policy  
 "for L. 300 at three guineas *per cent*. The ships clearances  
 "from

## CASE

I.

“ from the custom-house in London, and her other papers  
 “ were all made out as for Ostend only ; but the ship and  
 “ goods were intended to go from London to Nantz with-  
 “ out going to Ostend ; bills of loading in the French Lan-  
 “ guage, dated the 18th July 1778, were signed by the Cap-  
 “ tain in London, but purporting to be made at Ostend ; and  
 “ that the goods were shipped, there to be delivered at Nantz.”  
 The ship was afterwards captured, hostilities having com-  
 menced betwixt Britain and France, and the underwriters,  
 when payment of the loss was demanded, contended that a  
 fraud had been practised upon them. The vessel “ having  
 “ been cleared out for Ostend, when she was not designed  
 “ for that place.” Upon this point Lord Mansfield thus ex-  
 pressed himself. “ This verdict is impeached upon two  
 “ grounds : 1. It is said there was a fraud on the underwri-  
 “ ters in clearing out the ship for Ostend, when she was  
 “ never intended to go thither ; but I think there was no  
 “ fraud on them, perhaps not on any body. What has been  
 “ practised in this case was proved to be the constant course  
 “ of the trade, and notoriously so to every body. The reason  
 “ of clearing for Ostend, and signing bills of loading, as from  
 “ thence did not fully appear, but it was guessed at. The  
 “ fermiers generaux have the management of the taxes in  
 “ France ; as we have laid a large duty on French goods, the  
 “ French may have done the same on ours ; and it may  
 “ be the interest of the farmers to connive at the importa-  
 “ tion of English commodities, and take Ostend duties rather  
 “ than stop the trade, by exacting a tax which amounts to  
 “ a prohibition. But at any rate, this was no fraud in this  
 “ country ; one nation does not take notice of the reve-  
 “ nue laws of another. With regard to the evasion of the  
 “ light-house duties, the ship was not liable to confisca-  
 “ tion on that account.” Judgement was given against the  
 underwriters.

II. The second defence is founded on the deviation from  
 the voyage insured. This is supported by the evidence which  
 was taken before the Court, in America, by which the vessel  
 was condemned ; and exclusive of that, there is no evidence  
 whatever of any intended deviation. The pursuers shall, 1<sup>st</sup>,  
 inquire, whether the insurers would have been liberated if  
 half of the cargo had been discharged off the bar at Charle-  
 ston (the deviation said to be proved) : and, 2<sup>dly</sup>, whether such  
 an intention, not carried into execution, would vacate the po-  
 licy.

1. The expression in a policy, “ liberty to call at a place,”  
 means in general liberty to dispose of, or discharge part or  
 the whole of the cargo at that place ; though the pursuers  
 shall

the contemplation of the parties to sail upon the  
d, if all the ship's papers and documents be  
another place from that described in the po-  
er is discharged from all design of responsibi-  
gh the loss should happen before the dividing  
wo voyages."

reference was had to a case reported by  
p Molly was insured "at and from Mary-  
The ship was cleared out from Maryland  
bond given that all the enumerated goods  
ritain, and the other goods in the British  
avit of the owner stated, that the vessel  
th. The bills of loading were to Fal-  
;" and there was no evidence what-  
for Cadiz. This vessel was taken in  
to both Falmouth and Cadiz. But  
o presume that she was meant for  
of Boston, to supply the American  
addressing the jury, told them,  
it is from Maryland to Cadiz.  
ust be founded on truth, and  
v. When the insured intends  
vage, it is always provided  
upted to it. There never  
a deviation from the voy-  
e is made, because that  
mnification. Deviations  
after thoughts, after in-  
party who actually de-  
d means to give up his  
v intended, but never car-  
ation. In all the cases of  
and *ad quem*, were certain  
he voyage ever intended for  
evidence of the design to go

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“ grounds of defence was, that the ship never sailed from  
 “ Guadaloupe to Havre, but on a voyage from Guadaloupe to  
 “ Brest. Lord Mansfield in answer said, the voyage to Brest  
 “ was at most but an intended deviation, not carried into ef-  
 “ fect.” The same opinion is delivered by Lord Mansfield,  
 Woolbridge v. Boydel, Douglas, 16.

The pursuers shall not draw the line betwixt alteration and deviation. The underwriters, leaving the only evidence that there is of an intended deviation, have, without any authority, supposed that the voyage actually performed was a different one from the one insured; and on that ground have applied to this case the doctrine of Lord Mansfield in the case of Woolbridge v. Boydel, where his Lordship says, “ In short, “ that was never the voyage intended, and consequently is “ not what the underwriters meant to insure.” But here the vessel had liberty to call at Charleston, and she was on her way thither when she was captured. Supposing therefore the plan of discharging part of the cargo not to have been allowable by the policy, still it was only an intended deviation not carried into effect, and therefore not sufficient to annul the contract.

Argument for  
 the under-  
 writers.

There are two principles perfectly established in the law of insurance, upon either of which the defence in this case may be securely founded: I. If the insured had in view from the beginning a voyage different from that mentioned in the policy, then the policy is void. II. Any material concealment on the part of the insured has the same effect of vacating the policy.

I. The insurance of a different voyage from the one to be actually performed is void, for this reason, that there can be no obligatory contract where the parties are not at one. When this concealment happens there must be some reason for it; either the insured must be conscious that the hazard of the intended voyage is greater than that of the one held out, so as to require a higher premium, or it must be such that they could not procure insurance at all; perhaps both difficulties occurred in this case: The last, certainly did, for the insurers, had they known that a smuggling adventure was in view, would not have subscribed the policy upon any account. Where this variation has taken place, it is of no consequence whether the voyage be equally dangerous: on the above principle the contract must be void.

Park, p. 360.

That such is the law of insurance, both here and in England, is laid down by the writers on the subject, and established by the decisions of the Courts of both countries. “ If it can “ be made appear by evidence that it never was intended, nor “ came

“ came within the contemplation of the parties to sail upon the  
 “ voyage insured, if all the ship’s papers and documents be  
 “ made out for another place from that described in the po-  
 “ licy, the insurer is discharged from all design of responsibi-  
 “ lity, even though the loss should happen before the dividing  
 “ point of the two voyages.”

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 1.

To illustrate this, reference was had to a case reported by Douglas. The ship Molly was insured “ at and from Mary-  
 “ land to Cadiz.” The ship was cleared out from Maryland to Falmouth, and a bond given that all the enumerated goods should be landed in Britain, and the other goods in the British dominions. An affidavit of the owner stated, that the vessel was bound for Falmouth. The bills of loading were to Falmouth “ and a market;” and there was no evidence whatever that she was bound for Cadiz. This vessel was taken in the course from Maryland to both Falmouth and Cadiz. But there were many reasons to presume that she was meant for neither, but for the port of Boston, to supply the American army. Lord Mansfield, in addressing the jury, told them, “ The policy on the face of it is from Maryland to Cadiz.  
 “ All contracts of insurance must be founded on truth, and  
 “ the policies framed accordingly. When the insured intends  
 “ a deviation from the direct voyage, it is always provided  
 “ for, and the indemnification adapted to it. There never  
 “ was a man so foolish as to intend a deviation from the voy-  
 “ age described when the insurance is made, because that  
 “ would be paying without an indemnification. Deviations  
 “ from the voyage insured arise from after thoughts, after in-  
 “ terest, after temptation, and the party who actually de-  
 “ viates from the voyage described means to give up his  
 “ policy. But a deviation merely intended, but never car-  
 “ ried into effect, is as no deviation. In all the cases of  
 “ that sort the *terminus a quo* and *ad quem* were certain  
 “ and the same. Here, was the voyage ever intended for  
 “ Cadiz? There is not sufficient evidence of the design to go  
 “ to Boston for the Court to go upon, but some of the papers  
 “ say to Falmouth, and a market, none mention Cadiz; nor  
 “ was there any person in the ship who ever heard of any in-  
 “ tention to go to that port. A market is not synonymous;  
 “ that expression might have meant Naples, Leghorn, or  
 “ England. No man upon the instructions would have  
 “ thought of getting the policy filled up for Cadiz. In short,  
 “ that was never the voyage intended, and consequently not  
 “ what the underwriters meant to insure.” A verdict was found for the defendant.

Upon the same principles was a question decided before the Buchanan v. Hunter Blair.  
 Court of Session, 15th July 1779, Buchanan v. Hunter Blair.  
 John and George Buchanan, in consequence of some misap-

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prehension between them and their agent at Honduras, got insurance done upon their vessel the *Jeanie*, from Honduras to Bristol, while the agent had cleared out for London. The vessel was wrecked soon after her departure from Honduras; the underwriters refused to pay the loss, because the voyage had been altered. When this question came before the Court of Admiralty, the "claim of the insured was dismissed."

In a reduction of this judgement it was pleaded for the insured, "That they had entered into the policy *bona fide*; that the clearing out for London implied nothing more than an intention to deviate from the voyage; but an intention to deviate does not vacate a policy. When a vessel is lost before actual deviation, as in the present case, the insurers remain bound. It is of no consequence at what time the intention to deviate is taken up, whether before or after the voyage commences, if there is not an actual deviation.

"It was answered on the part of the underwriters, that it is enough for the present purpose, that in point of fact the ship was dispatched upon a voyage to London, and consequently not upon the voyage insured; though the insurers had not been in the knowledge of the fact, the policy is thereby discharged. The insurance is undertaken on the footing of a particular adventure or voyage, with respect to which alone the insurer is presumed to have calculated a premium, or chosen to become bound. If the vessel sets out on any other voyage, no claim can be made against the insurer on the policy, as it does not apply to the voyage.

"The argument of the pursuers, upon the effect of a deviation, is misapplied. The present question does not occur in a case of deviation from a voyage on which the vessel had set out, but in a case where the destination of the vessel was altered from the first, and the insured voyage never began. London was the only port to which the ship was destined, and she never went on a voyage to Bristol, the port to which she was insured.

"This is therefore a question on the construction of the policy, whether a voyage to London was covered by the insurance of a voyage to Bristol, on no other account but that the course to both is the same for part of the way. Were it found to be so, the judgement would have very extensive consequences. It is obvious, that the course of voyages to very different and distant parts of the world is often the same for a considerable part of the way, and insurers would be left in total uncertainty what was the voyage actually undertaken." The judgement of the Admiralty Court was approved of, and the reduction dismissed.

II. A

II. A concealment on the part of the insured vacates the policy. The voyage was from Georgetown to the island of St. Thomas: But it appears that the vessel was destined for Charleston, for the purpose either of smuggling her cargo thither for the use of the British forces, or of delivering at least one half of her cargo without the bar of Charleston. If the former of these shall be supposed to have been the plan, it was upon that idea that the vessel was condemned by the Americans, and it was a different voyage from the one insured; it was a voyage to Charleston in the hands of the British, in place of a voyage to the neutral port of St. Thomas's. But if the latter plan be supposed to have been that of the insured, the risk was thereby greatly increased; for if the cargo was to be taken from the Batchelor, and put on board of another vessel without the bar, the operation must have required considerable time, as it could only be done by the intervention of boats; and as it was towards the end of December, some days must have been necessary, and this of itself would have added greatly to the risk, and ought not to have been concealed.

But this is not all; besides the danger from the sea and the weather, the vessel must have been exposed to American privateers during the whole time of unloading: this was therefore a most material fact; and the only reason for concealing it must have been the effect which it would have produced in raising the premium of insurance.

The pursuers labour to prove from the passport, and from other circumstances, that the insurers must have known that a connection was to be formed with the British, and that consequently the great risk was that of capture by the Americans. The insurers undoubtedly did see that there was to be a connection with the British; but that is not the question: The question is, whether the voyage was not different from that insured? or, whether a fact, which added materially to the risk, was not concealed? There was nothing in the circumstances which could inform the insurers that the vessel was to deliver her whole cargo at Charleston, but quite the reverse; or, in the other view, there was nothing from whence the insurers were to conclude that the vessel was to lie off the bar of Charleston, and there to unload one half of her cargo.

It has been further said, that when a policy contains a power to call at an intermediate port, it implies a power to discharge part of her cargo at that port. Whether this general proposition be just does not appear to be well fixed. But the insurers have no occasion to go into that question, they apprehend, that when power is given to call for a special purpose, it is exclusive of any other purpose; here it was "to join convoy," and that was inconsistent with discharging her cargo,

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go, as she could then have had no occasion for convoy. Besides, suppose this liberty were to import a power to discharge, it can never imply one to lie out at sea in the most dangerous season of the year, exposed to the danger of winds and waves, and enemies, for days together. Had this power to call been general, the insurers would have been led to consider consequences; to call for convoy seemed only to lessen the risk.

In the case of *Planché and Jacquery*, quoted by the pursuers, a very material circumstance is kept out of view, that of the general practice in the branch of trade in which the insurance took place; but here the circumstances were not regulated by the common course of trade.

A great deal of argument has been used by the pursuers to prove that an intention to deviate does not affect the policy, unless the deviation has actually taken place. But this is out of the question, a deviation supposes that a policy was *bona fide* entered into, and that at the date of the policy the insured had no other voyage in view than the one specified in the policy; there parties are at one, and an after intention to deviate does not vacate the policy. But here the insured had, from the beginning, views different from those spoken out. They could not be said to have formed an intention to deviate from the voyage, as they never at any period intended to perform it.

#### Opinions.

*Lord Justice Clerk.*—From the extent of the premium, there must have been some other risk insured against than the danger of the sea. What then was that risk? As this was an American vessel, cleared out for a neutral port, there should not have been any occasion to insure against the Americans, and the only other risk must have been from the British cruisers. But when it is considered that the ship was allowed to call at Charleston, and join convoy, at a time when the British fleet was lying there, it could only be a British convoy, under which it could sail, and therefore the vessel must also have been liable to be captured by the Americans. The underwriters could not fail to see this; it is the very circumstance that raised the premium so high, and therefore a capture by the Americans can never be a sufficient ground on which to acquit the underwriters. On the other hand, the vessel was insured from Georgetown to Charleston, and therefore there was no deviation. The only ground then is, that there has been here an unlawful proceeding, sufficient to void the policy. It is said to have been proved by the crew that there was an intention of landing goods at Charleston, and that this is the circumstance on which the condemnation proceeded. There is no

occasion to inquire into the propriety of that condemnation; but it is clear from circumstances, that it must have appeared to the underwriters that there were goods to be landed for the British, else, where was the occasion for getting under a British convoy? or how was it possible to have got under it? In the first place, there was no danger from the Americans, and therefore the voyage might have been continued to St. Thomas's. Secondly, This was an American vessel, and never could have been entitled to a British convoy. Be this, however, as it may, it was a mere intention in the master only, and that is not enough to void the policy. His Lordship illustrated this from the excise laws, which do not extend to a vessel where there is only an intention of smuggling.

Lord *Eschgrove*.—Insurance is a *bona fide* contract, and therefore, wherever there is either an imposition on the underwriters with respect to the destination, or after the policy is made out a deviation from the voyage insured, these are sufficient to infer a forfeiture of the insurance. But it does not appear that the present case falls under either of these. When this cause was last before the Court, I reasoned from the terms of the policy. It struck me, that as the insured were Americans, it was natural for them to insure against the British, whom they were at war with, rather than against their own countrymen. The voyage was not to be simply from Georgetown to St. Thomas's, but liberty was given to touch at Charleston. This length the underwriters may have understood the insurance to have been against the British; but they were now to joinconvoy; and as there was only a British convoy at Charleston, this indeed would have been running into the mouth of the enemy; the underwriters therefore must have known that they were to supply the British fleet, and in this way to obtain the protection of a British convoy. But this ship was liable also to capture by the Americans, in consequence of being in a British port; therefore the insurance was against both British and Americans. There could here be neither imposition nor fraud, for it was impossible from the policy to give the voyage any other construction than the real one; neither was there any deviation, for the ship was to go into Charleston, and therefore the policy could not be voided by being taken at the bar. It is said there was an intention of putting part of the cargo into another vessel; but this was no deviation with respect to the underwriters, for they must have known that to supply the British fleet was the great intention of going to Charleston: the letter now produced corroborates all these ideas.

Lord *President*.—In this case there was a circumstance affecting the risk not spoken out, and a circumstance too, which was the sole cause of the capture of the vessel, that was, the intention of smuggling part of the cargo if a certain ship was

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was at Charleston. The voyage was truly, as described in the policy, for St. Thomas's, but liberty was given of touching at Charleston only to join convoy; this implies that the voyage was not finished. From the letters it appears, that there was no risk from the Americans, but a great risk from the British in running from Charleston to St. Thomas's. The circumstances were concealed which chiefly affected the risk; and the underwriters surely are not to be liable for a loss arising from these concealed circumstances.

Lord *Swinton*.—I was affected at first by the same considerations which the Lord President has just stated; but after considering them with attention, they do not appear strong enough, for the circumstances communicated to the insurers implied the nature of the risk. The circumstance occasioning that risk was the communication with the British fleet, and this appears, from the words of the policy, to have been in the view of the underwriters.

Lord *President*.—Suppose a ship cleared out from France to Scotland in the 1745, and insured for a smuggling voyage, against capture by British ships, the vessel is taken not smuggling, but bringing arms to the rebels, surely the underwriters might have said that the risk was concealed.

Lord *Dunfinnan*.—A policy ought to be clearly expressed, and not left to inference.

Lord *Eskegrove*.—In England liberty to call at a port implies liberty to dispose of the cargo.

Lord *President*.—If the clause be general, no doubt they may unload, but when allowed only to call for convoy, they can call for no other purpose.

State of the vote, adhere or alter: It carried adhere by the President's vote.

Judgment.  
Nov. 1790.

The Court refused the petition, and adhered.

|                                   |             |                    |          |
|-----------------------------------|-------------|--------------------|----------|
| For the Pursuers, Arch. Campbell, | } Advocates | W. Anderson, C. S. | } Agents |
| Defenders, Ad. Rolland,           |             | Robert Syme, C.S.  |          |

Lord Dreghorn Ordinary.

Menzies Clerk.

Vol. II. No. 17.

II. JAMES

II. JAMES PATERSON and Company, Merchants in Greenock,

AGAINST

JOHN DUGUID, Merchant in Glasgow.

The draught of water of a ship, or the depth of a harbour, are circumstances which every underwriter is presumed to know; and therefore their not being communicated to the underwriter at subscribing is no ground for vacating the policy.

THE Friendship belonging to James Paterson and Company was lying in Charleston harbour, taking in her cargo for Greenock in January 1788. On the 18th of that month, Adam Coufar, the commander of the vessel, wrote the owners in these terms. "Gentlemen, I take the opportunity, by Captain Angus for London, of acquainting you of my welfare and the ship's company. We now want about 100 hogsheds to fill up; but I am not certain if we can take so much on board, before the ship draws too much water for the bar. Messrs. Ewans and me have been consulting about taking in a craft load, rather than lie for high tides. I think the ship will make about L. 600 freight, if we can get her properly loaded. I have purchased about 800 staves, and about 150 barrels, naval stores, different kinds. I cannot say positively at present if we will have to purchase any more to fill up with or not. I think the best way for you is to insure every thing from the wharf, as I am most afraid of the bar; however, we got in very luckily, and I expect we will get as well out over the bar. I think we shall be clear about the latter end of this month, but may be detained waiting on spring tides, &c."

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This letter was received on the 10th March by the owners, who a day or two before its arrival had opened a policy of insurance on the freight. On receipt of the letter, they put it into the hands of Mr. Johnston their broker, with directions to insure L. 500 on the freight, and L. 150 on goods.

Mr. Johnston procured insurance at Greenock to the extent of no more than L. 150 Sterling on the freight. Of this sum L. 100 was underwritten before the letter of the 18th January was put into his hands. Two days after, that is, on the 12th March, Mr. Johnston wrote, and the owners signed the following order, addressed to Mr. Brown, insurance-broker in Glasgow. "Greenock, 12th March 1788. Sir, our ship Friendship,  
N n " Cap-

## CASE

## II.

“ Captain Coufar, was loading at Charleston for Greenock.  
 “ Our last advices are of the 18th January last, and was ex-  
 “ pected to be clear by the end of that month. Please insure  
 “ L. 350 on the freight of said ship, valuing it at L. 600 Ster-  
 “ ling; also insure L. 150 upon goods *per* said ship, at and from  
 “ Charleston to Greenock; premium two guineas and a half  
 “ *per cent.*”

This order was transmitted to Mr. Brown by Mr. Johnston. Johnston did not transmit Coufar's letter of the 18th January, but he wrote Brown, as appears from Brown's oath, “ that  
 “ as much had been insured on the ship Friendship at Green-  
 “ ock as could be got done.”

Upon receipt of the order, Brown opened a policy, in which L. 350 on the freight was underwritten by different persons; and John Duguid, the defender, underwrote L. 150 on the goods. These insurances were made at two guineas and a half *per cent.* The ship had been formerly insured on the voyage. Coufar, the commander of the vessel, wrote to the owners on the 7th, 14th, and 20th February; but these letters did not arrive till after the insurance was made. The ship sailed from Charleston on the 21st February, loaded with goods belonging to the merchants of Charleston, and having on board two gentlemen, passengers from that place. She was spoke with on the 25th of February, three days after she had sailed from Charleston, and 138 leagues distant from that place; at that time all was well: but these were the last accounts that were received of her.

The underwriters on the freight and on the ship, satisfied that she must have perished at sea, settled with the petitioners; the defender alone evaded a settlement on various pretences, and seems to have endeavoured to procure arrestments to be used in his hands, that he might be enabled to retain the sum he was due.

An action for payment being raised, and coming before the  
 June 29. 1790. Court of Admiralty, the defender was found liable “ in pay-  
 “ ment to the pursuer of the sum of L. 150 Sterling, under-  
 “ wrote by him on the goods libelled, with interest from the  
 “ 7th March 1789.”

This decree was brought under review of the Court of Ses-  
 Dec. 23. 1790. sion by suspension; and the Lord Justice Clerk, before whom  
 the question came, “ suspended the letters simpliciter.” The  
 question was then brought before the Court on a petition for  
 the pursuers.

Argument for  
 the insured pur-  
 suers.

All questions of this kind must resolve into a special question,  
 “ Whether (in the words of a great English authority) there  
 “ was, under all the circumstances at the time the policy was  
 “ underwritten, a fair representation, or a concealment,  
 frau-

“ fraudulent if designed, or though not designed, varying materially the object of the policy, and changing the risk understood to be run. There are at the same time certain general principles which must be kept in view. These principles are clearly laid down in the case *Carter v. Bohm*, as reported by Barrow.

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In stating the nature of that concealment, on which a policy should be held void, the eminent judge above alluded to lays down these maxims. “ Insurance is a contract upon speculation; the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriters trust to his representation, and proceed upon confidence that he does not keep back any circumstance in his knowledge, so as to mislead the underwriters into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist, the keeping back of such circumstance is a fraud, and therefore the policy is void.

“ Although the suppression should happen by mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is equally different from the risk understood, and intended to be run at the time of the agreement.

“ The policy would equally be void against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to be arrived, and an action would lie to recover the premium.”

Having thus shewn the grounds upon which material concealment ought to void an insurance, his Lordship proceeds to distinguish between such concealment, and an innocent silence. “ There are (says his Lordship) many matters as to which the insured may be innocently silent; he needs not mention what the underwriter knows, *scientia utrinque par pares contrahentes facit*. An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew, what way soever he came to the knowledge, The insured needs not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waves being informed of. The underwriter needs not be told what lessens the risk agreed and understood to be run, by the express terms of the policy; he needs not be told general topics of speculation; as for instance, an underwriter is bound to know every cause, which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, and earthquakes. He is bound to know every cause, which may occasion political perils from the ruptures of state, from war, and from the various operations of war; he is bound to

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II.

Carter v.  
Bohm.

“ know the probability of safety, from the continuance or re-  
 “ turn of peace, from the imbecility of the enemy, through  
 “ the weakness of their councils, or their want of strength.  
 “ If an underwriter insured private ships of war by sea and  
 “ on shore, from ports to ports, and from places any where,  
 “ he needs not be told the secret interprises upon which they  
 “ are destined, because he knows some expedition must be in  
 “ view, and from the nature of his contract he waves the in-  
 “ formation without being told. - If he insure for three years,  
 “ he needs not be told any circumstances to show it may be over  
 “ in two, or if he insure a voyage with liberty of deviation,  
 “ he needs not be told what tends to show there will be no  
 “ deviation. Men argue differently from natural phænomena  
 “ and political appearances; they have different capacities,  
 “ different degrees of knowledge, and different intelligence.  
 “ But the means of information and judging are open to both;  
 “ each professes to act from his own skill and sagacity, and  
 “ therefore neither needs to communicate to the other.

These principles have been applied in a variety of cases; and in the case of Carter v. Bohm, they were most aptly applied, to point out those circumstances which the insured are not obliged to communicate. The case was this, Carter, who was governor of Fort Marlborough, in the East Indies, had procured insurance against capture by a foreign enemy for one year, from the 16th October 1759; the fort having been taken within the year, the question arose on the validity of the insurance; the insurers contending that the policy was void, in respect of undue concealment on the part of the insured:  
 1. Because the state and condition of the fort was not disclosed.  
 2. Because the governor did not mention, that the French, not being able to relieve their friends on the coast, were more likely to make an attack upon that settlement.  
 3. That he had not disclosed his having received a letter of the 4th February 1759, from which it appeared that the French had had a design of attacking the fort the year preceding. But this plea on the part of the insurers was overruled.

Thomson v. Bu-  
chanan.

Upon the same principles was decided the case of Thomson v. Buchanan. There an insurance was made upon this note.  
 “ The advice from Gibraltar was of the 28th September 1778,  
 “ and the vessel only arrived the day before, and had a cargo  
 “ to discharge. If said ship sails with convoy from Malago to  
 “ Gibraltar bound for England, and arrives safe, L. 5 per cent.  
 “ shall be returned.”

Before effecting this insurance the following letter was received, which was not communicated to the insurers. “ This  
 “ is to acquaint you of my arrival here yesterday, after a long  
 “ hard passage, and to acquaint you that there is as much dan-  
 “ ger going from here to Malago as coming from England  
 “ here.

“ here. I heard that the merchants at Malago wont ship any  
 “ goods on board English ships, before they hear of a convoy  
 “ to take them from there. I am going to write Mr. Ferry  
 “ by post, to hear what he thinks of it; for there is a great  
 “ number of ships at Malago that is chartered, and the mer-  
 “ chants wont ship aboard of them; they are shipping aboard  
 “ Spanish ships for London.”

It was from the want of this information, that the insurers  
 “ maintained that the policy was void; the judge.admiral re-  
 “ pelled the defence. This judgement was altered in the  
 “ Court of Session; but the case having been appealed, the  
 “ House of Peers found the policy effectual, and gave decree  
 “ against the underwriters.

Such are the principles respecting questions of this nature;  
 the pursuers shall now consider how they affect the contents  
 of the letter from Coular of the 18th January. The insurer  
 insists on three particulars, as appearing from this letter, which  
 ought to have been communicated, 1. The danger arising from  
 the bar off the harbour of Charleston. 2. That the ship was  
 in bad repair. 3. That she was overloaded.

1. The nature of a harbour, such as Charleston, to which  
 there is such great resort, is one of those circumstances of ge-  
 neral notoriety which every underwriter must be supposed to  
 know.

2. The state of the vessel. But there is nothing in the let-  
 ter upon the subject; the danger of getting out was not from  
 the state of the ship, but from the nature of the bar. Besides,  
 there is direct evidence from a letter by the ship-carpenters at  
 Port Glasgow, that she was in compleat repair, and there is  
 the strongest circumstantial evidence, from the large sum un-  
 derwritten on the ship and cargo at Grenock, where she was  
 known, from the value of goods shipped in her by merchants  
 who saw the state of the vessel, from the circumstance of the  
 two gentlemen having taken their passage on board of her, from  
 her having passed the bar without damage, and from her hav-  
 ing been met with, in the space of three days from the time  
 of her sailing, nearly four hundred miles from Charleston.

3. That the ship was overloaded. It is not necessary to spe-  
 cify either the burden of the ship or the draught of water;  
 and when neither of these particulars are inquired into, the  
 want of information in regard to them does not vacate the  
 policy. The burden of ships and their draught of water are  
 particulars known to every insurance broker; for this purpose  
 there is a regular survey kept at Lloyd's coffee-house; it  
 expresses the name of the ship, of the master, the tunnage,  
 and the draught of water; and of this survey a copy is kept by  
 every considerable insurance broker for the information of the  
 under.

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underwriters. And as to the inference of the overloading, from the master's letter of the 18th, it bears that the ship was not then loaded; it wanted 100 hhds to fill up; and the letter so far from leading to the inference, that the master would rashly overload the vessel, shows that he was a cautious and anxious man.

In a word, then, it being held that the insurer was in the knowledge of the bar, there is nothing in this letter that could have given him any information which ought to have deterred him from underwriting the policy; and still less so, when, besides the knowledge of the bar, the insurer knew or ought to have known the ship's tunnage and draught of water.

Argument for  
the insurer de-  
fender.

It is impossible to read the letter of the 18th January, without seeing that the master of the vessel entertained very great apprehensions about getting over the bar, and this ought to have been communicated. The owners knew, as well as the shipmaster did, that there was a bar at Charleston; but the shipmaster considered it to be his duty to warn the owners of the danger arising, from the manner in which he meant to load the vessel, his advice is to insure every thing from the wharf; he adds, "I am most afraid of the bar."

When the order for insurance was sent to Glasgow, this letter was kept back, and when they mention the time of sailing, a very important clause of the letter is suppressed; the order says that the vessel was "expected to be cleared by the end of the month." But it does not contain these words of the letter which immediately follow the former, "but may be detained waiting the spring tides." And this must have been a studied concealment; for the person transcribing the clause would have gone to the end of it, unless there had been a reason for stopping short.

This leads the defender to consider the principles laid down in the case of *Carter v. Bohm*, as they are general ones, which must enter deeply into the present question.

The special fact upon which the contingent chance was in this case to be computed, arose from the heavy loading and great draught of water which was thereby rendered necessary for floating the vessel, a circumstance which certainly lay in the knowledge of the insured. Nor is it of any consequence whether the concealment of that circumstance was through mistake or design, since in either case it must vacate the policy.

The pursuers say that there is a distinction between facts which are peculiar to the voyage or vessel insured, and those which are or ought to be of public notoriety. But it is in the nature of things impossible that an underwriter can be so well acquainted with the condition of a particular vessel, the risk  
the

she is to run, and the time of her arrival and departure, as the owners who are in constant correspondence with the shipmaster; and this distinction cannot be better illustrated than by the circumstances which occur in this case. The bar of Charleston is a matter of public notoriety, which requires no notice; but the intention of loading this vessel very deep was the circumstance of private information, which ought to have been communicated.

The pursuers have said that there are three particulars founded on by the defenders: 1. The nature of the bar at Charleston (but this the defenders disclaim). 2. The state of the vessel. And, 3. her drawing so much water.

With regard to the draught of water, and the survey kept at Lloyd's, although this appears exceedingly plausible, yet the application of it to this case must fail; a ship draws more or less water as she is heavy loaded, or the reverse: and although it may be true, that with an ordinary loading, the vessel in question would draw only fifteen feet of water, as entered in the survey, in which case she might easily have got over the bar; yet in the letter of the 18th, the captain expressly says that he was afraid she would draw too much water for the bar; and as this was a circumstance that could only be known to the insured, it certainly ought to have been communicated to the underwriters.

The circumstance of the ship's having been spoke to some days after she sailed is of no consequence; if there was a concealment of the danger that of itself vitiates the policy: But, besides, the ship may have been stressed in passing the bar, and may have then received the damage which occasioned the loss, though she did not immediately go down.

*Lord Henderland.*—It is certainly necessary that the insured should give such information to the insurer as may enable him to form a judgement of the risk. But where the circumstances are of that nature, that they must be equally well known to the underwriters as to the insured, the policy cannot be set aside, although no communication has been made. The ship in question, when loaded, drew sixteen feet; it was doubtful, when the letter of the 18th was written, whether the shipmaster was to take in her loading before or after passing the bar. In short the matter comes to this; there is a bar at Charleston, and every underwriter knows there is a risk in loading a vessel within the bar. Lloyd's list shows the ordinary draught of every ship; and the underwriter should know the height of water on the bar, and judge for himself. The shipmaster seems to have been a careful man, and there is nothing in the letter that should have deterred an underwriter from undertaking the risk.

*Opinions.*

*Lord*

C A S E

II.

Lord *Eskgrove*.—This is a contract where *optima fides* should be observed. The insurers have not an opportunity of knowing all the circumstances which may affect the risk: but it is laid down, that where the information is not material, the neglect to communicate it does not vacate the policy: It is equally established, that where the information is material, an accidental omission is no excuse for the want of communication. Here part of the insurance was made at Greenock on the ship, &c where the letters were fairly shown; so that it was owing to mere accident that the letters were not produced to the insurers at Glasgow; and it is clear that the underwriters in Greenock did not consider the information contained in these letters to be of such a nature as to alter the risk. This, though strong, is not all, for it is certain that the underwriters must have known all that is contained in the letter of the 18th January. They must have known the draught of water of the vessel, and must have understood that when loaded she was able to pass the bar. In Lloyd's coffee-house they have a list of shipping, with their tunnage, where this very vessel is entered: in this contract it must be taken for granted by the insurers that the insured will fill up the ship to the utmost; they are entitled to put on board every ounce of weight that she is able to bear, and every underwriter must proceed on the supposition that that will be done. Now we have not seen that a ship of the weight of this vessel could not pass the bar; on the contrary, we are told that ships of a thousand tons burden have passed it. The merchants there shipped goods on board this vessel. Two inhabitants of the place, who had an opportunity of seeing her, and making inquiries about her, took their passage in her. In short, there was a *bona fides* in loading this vessel, or the merchants and passengers would not have risked themselves and goods on board of her. There was evidently a great anxiety in the master; and it appears that he thought it necessary to wait for the spring tides; but this last circumstance is no more than what happens in many other places. In Leith harbour, for instance, many ships must wait for spring tides; but there is no reason why this ought to be told to the underwriter. The letters of the master show that he was a most careful man; and they must have been satisfactory to the underwriter had they been shown to him, for the real danger must have been known. Had I been an underwriter, and seen these letters, I would rather have underwritten on that risk, where I saw the master so careful and anxious, than if these letters had not been shown to me; this man was willing to run less risks (and at an expence too of loading part of the cargo beyond the bar) than other shipmasters would have run. Concealing information that would increase the expence of

of insurance is a fraud: this concealment is not of that nature; it would rather have lessened the expence of insurance, at least would have led an underwriter to insure. I am the less uneasy in overruling this plea, when I see the vessel continue her voyage for three days, and proceed 400 miles on her passage after passing the bar. I have formerly expressed my intention of supporting underwriters where justice and equity requires it. But I confess I am sorry to see so many questions arise on this subject, more particularly from the west country. I wish the underwriters would act with more liberality, and imitate the example of our neighbours in England.

The Court altered the interlocutor.

Expences were then moved for by the pursuers.

Lord *Henderland*.—I am not for expences, on this ground, that the insured did not send the captain's letters to the underwriters. At the same time, I cannot help expressing my displeasure at the conduct of insurers; and I wish much to discountenance the pleas which we have occasion to see so frequently brought before us. Opinions.

Lord *Justice Clerk*.—This is a contract founded on the strictest *bona fides*. The case of the underwriter is so far a favourable one, that he cannot know the circumstances of the risk so well as the insured; therefore, if there has been an improper concealment it will be a good defence: But on the other hand, I do not like to see underwriters illiberal in their conduct, or refusing to pay a loss, when, if the ship had come safe, they would have drawn a premium from the owner. I am for giving expences to the insured, as without that you do not afford them a complete redress.

Expences awarded.

“ The Lords having advised this petition, with the answers thereto, they find the letters orderly proceeded, and decern.  
 “ Find the defender liable to the pursuer in expences of process in this Court; and appoint an account thereof to be given in.” Judgement.  
June 15, 1792.

For the pursuers, Ad. Rolland, }  
 defenders, Cha. Hay, } Advocates. Cha. Livingston, }  
 J. Dickson, W. S. } Agents.

Lord Justice Clerk Ordinary.

Mitchelson Clerk.

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O o

INTE-

## INTEREST.

I. The Trustees of the late JANE Marchioness of Lothian,  
Pursuers;

AGAINST

WILLIAM SIMPSON of Viewfield, Esq; Defender.

Feu-duties to a considerable amount being retained by a vassal, on the footing that the superior was indebted to him; but it being found that the vassal had no claim against the superior, interest was allowed upon the feu-duties during the time they had been retained.

C A S E

I.

THE superior of the lands of Viewfield having, in virtue of reserved powers, sold the coal in the lands, the principal question betwixt the parties in this action, related to the right claimed by the defender of retaining the feu-duties, in relief of certain damages sustained by him through the working of the coal; and it having been found that the vassal's claim of relief was competent only against the proprietor of the coal \*, and that he had no right to retain the feu-duties, the question came then to be, whether the superior was entitled to interest upon the feu-duties which had been retained.

The facts upon which this question came before the Court were these: The suspender, in the 1781, succeeded to the estate of Viewfield held in feu of the pursuers: from the 1764 down to that period there had been disputes between his predecessors and Mr. Clerk of Elden, the proprietor of the coal in the lands; and it was not till the 1784 that these were terminated. At this time the Court found that Mr. Clerk was liable to the suspender in 356 l. 11 s. 9 d. of principal and interest at Martinmas 1783, as the damage sustained previous to the 1781; and the Court also found Mr. Clerk liable in the interest of 238 l. 19 s. 10 d. thereof of principal from Martinmas 1783.

In the course of this litigation, it was found that the coals could not (consistently with the meaning of the original feu-contract, under which the defender held) be wrought from below the mansion-house and offices of Viewfield. It now

\* The decision on this point will be found under the title Superior and Vassal.

appeared probable, however, that the coal had been wrought out, and that there was great danger that the mansion-house, &c. which had been insured at L. 2000 Sterling, would be entirely destroyed by these operations.

In the 1782, the suspender wrote to the factor for the superior, stating his right to hold the feu-duties as a security for the damages he had suffered, and was menaced with from the working of the coal, and intimated his intention of retaining them. The feu-duties were accordingly retained for seven years, without any attempt on the part of the superior to exact them, or dispute the suspender's right of retention; and it appeared that latterly applications had been made by the defender to the pursuer's factor, requiring him to order the mines to be cleared, and an inspection made of the operations which had been carried on below the mansion-house.

This, however, was not done, but in May 1788, an action was raised by the superior for payment of the feu-duty, amounting then to 952 l. 15 s. 10 d. for the interest, which at Martinmas 1787 had amounted to 123 l. 16 s. 10 d. and for what should fall due in future, with 190 l. 11 s. 2 d. being a fifth part of the feu-duty of liquidated penalty. When this question came before the Court, the Lord Ordinary found that the damage ought to have been claimed from the proprietor of the coal, and that there was no right of retention against the superior; and on this ground his Lordship found the defender liable for the feu-duties.

The superior kept open the question of interest, and the vassal applied to the Court by petition. When this petition and the answers came to be advised, it was minuted, "that the vassal waved his claim of retention, in so far as extends to the damage from the 1764 to the 1781, contained in the decree against Mr. Clerk, the vassal in the coal:" And the Court found, "that the defender was entitled to retention of his feu-duties, in security of any damage which he had sustained, or might sustain, subsequent to the period when the damages were liquidated and awarded against John Clerk, Esq; of Elden." Jan. 27, 1790.

This judgement was afterwards altered upon a hearing in presence; and the cause being remitted to the Lord Ordinary, his Lordship, upon the question of interest, "altered the interlocutor represented against, in so far as it finds interest due on the feu-duties libelled from the date of citation only; and finds the defenders liable in interest as libelled:" against which judgement the defender applied to the Court by petition. May 24, 1791.

The claim of interest is not founded on the contract, or on any law, it is claimed upon the *mora* which took place. But to find such a claim, the *mora* should have been *sine causa*; and

Argument for  
the defender.

## CASE

I.



to prove that there was no reason for the delay, the pursuer insists that the question should be considered as if the defenders had retained the feu-duties without any pretence whatever, and that the *bona fides* cannot enter into the question respecting the interest. This is fallacious reasoning. Had the superior, in consequence of the intimation which was made to him through his factor, signified an intention not to acquiesce in the defender's claim of retention, and desired him to consign the feu-duties at his risk, the defender might admit that the profits of the consigned sum would fall to the superior. But in place of this, by his silence he afforded the defender a *bona fide* title of possession, and this *bona fides* is a complete refutation of the *mora* being unjustifiable.

Did this claim depend upon interest being the natural fruit of a subject which was found ultimately to belong to the pursuer, it might be sustained, but it is good for nothing when founded upon the unjustifiable *mora* or delinquency of the defender. In the former case, if the subject yields nothing, the proprietor draws nothing; if it yields much, he is entitled to it. In the latter case, it is merely a claim which the defender has refused to yield, and in which refusal he is sanctioned by apparent justice, and by the acquiescence of the pursuer for six years, during all which time the subject remained with him, and at his risk. He was under no obligation to employ it profitably, either for his own use, or that of his superior: If he did employ it, he must have done so at his own risk, and was entitled to the profits which it produced in compensation of that risk.

If the defender be right in this, there is no relevancy in the detached observations of the pursuer.

It has been said, that the defender was liable in interest, because he was found entitled to interest against Mr. Clerk. But the defender cannot conceive what contingency there is between the interest on damages incurred, during the period from the 1764 to the 1781, due by Mr. Clerk, and feu-duties falling due from the 1781 to the 1788, due to the pursuers. Even had the terms corresponded, the defender could not have been indemnified without interest, nor could that claim have been cut off from any *mora* on his part. But here the question is, whether damage be due to the pursuer? and the petitioner contends that it is not, the *mora* was with the pursuers, and entire *bona fides* with the defender.

It has been said that interest is due because the feu-duties were rendered alimentary in virtue of the conveyance to the Marchioness. But where was it ever heard of that tenants were to be subjected in interest on their rents, because a widow had got a locality over their farms; a landlord cannot render the situation of his tenants or feuers worse by any destination of his

his estate. The Court have gone far in allowing the superior to divide his right, so as to deprive the defender of his right over the feu-duties for the security of his damages; but it would be going greatly too far to convert an acknowledgement of superiority and base-service into an alimentary pension; nor is it at all clear that annuities to widows bear interest *ex lege*.

The general point that the defender was not entitled to retain his feu-duties, in lieu of the damages which he might suffer from the working of the coal, has been fixed, and the question now is, whether he ought not to be liable in interest on these feu-duties; and the pursuers are entitled to argue this question, as if the defender had retained the feu-duties without any pretence whatever: for it is impossible to say that the defender ought not to be liable in interest, because he ought not to have been liable in the feu-duty, when by a decision of the Court affirmed in the House of Peers, it has been found that the defender is liable in that feu-duty.

Argument for  
the pursuers.

The defender maintains that interest is not due *nisi, ex lege, vel pacto vel ex mora, nomine damni*. And this being applied to the present case, no interest can be found due. But the pursuers apprehend, that questions as to interest do not fall under any general rule; for although it may be true, that tenants and feuers, who for a short time are in arrears, ought not to be liable in interest; yet the same persons, from running long in arrears, may very justly be subjected to it. Were the rule contended for by the defender to be held as a fixed rule, it would happen that a debtor, who by any means was able to stave off payment, would derive a benefit from his own improper conduct, and the longer he could persevere in it the more would he be a gainer.

Holding that this cannot be the law of any country, the pursuers shall point out several circumstances in this case which ought to subject the defender in payment of interest.

The defender in his process with Mr. Clerk was allowed interest upon the damages awarded against that gentleman, and it was in security of these damages, in the first place, that retention of the feu-duties was claimed; but could any thing be more unreasonable than to retain upon that account, when these damages could have been paid on demand, or might have been instantly recovered under the decree which the defender held. But the defender has waved his title to retain for these damages, and there are no other damages ascertained but these. Again, he has been allowed interest on this claim of damages, ought he not then to pay interest on the sum which he retained to answer these damages?

Fur-

## CASE

I.



Further, the feu-duties retained by the defender were alimentary funds, part of the jointure of the late Marchioness of Lothian, and while the pursuers have been obliged to pay interest for the sums borrowed in lieu of the feu-duty retained, the defender has been drawing interest for them.

## Opinions.

Lord *Eskgrove* observed, that interest is not due on rents or feu-duties, though sometimes it is due on rents by stipulation.

Lord *Justice Clerk*.—When feu-duties are small, they are very often allowed to lie over till an entry takes place, and there no interest can be charged; but in this case the feu-duty comes to a great sum yearly, it is payable to a lady as an alimentary provision, and as it goes for her subsistence, if it be not regularly paid, we must consider her as under the necessity of borrowing money upon interest, and therefore in this case interest seems to be due *ex equitate*. In cases where it is doubtful whether a debt exists, there may be some reason to hesitate in giving interest, from an earlier period than that at which it is ascertained by a decree that a debt is truly due; but here there was no such question; there was no doubt as to the existence of the debt against Simpson, but his plea was, that the pursuers had the money in their own hands; we have found, however, that the pursuers had truly nothing in their hands, and the debt being from the first unquestionable, the creditor in it ought to receive payment *cum omni causa*. The defender has had the money in his hands, he has been making use of it, whilst the pursuer, from the want of it, must have been borrowing money and paying interest for it. It is very true that cases may happen where a debtor is ready to pay when the creditor (from the disputes of other parties) is not ready to receive it at the day of payment, and there the debtor may say I cannot be liable for interest, for I have had the money ready, it has lain a dead stock beside me. But that has not been the case here; the defence was, that the pursuers had it in their own hands, and that being false, there is no reason for refusing interest.

Lord *President*.—The circumstance of the feu-duty being alimentary cannot enter into view, that was the operation of the Lady's husband, the superior in the lands; but the defender, the vassal, has nothing to do with that allocation, and therefore upon that ground I cannot allow interest: But the defender had a decree against Mr. Clerk for damages and for interest, why was not that money recovered?

## Judgement.

June 5. 1792.

The Court adhered to the judgement of the Lord Ordinary, and refused the petition.

Against

Against this judgement a second reclaiming petition was presented, upon advising which the following opinions were delivered.

CASE  
I.

Lord *Justice Clerk*.—I was formerly of the opinion of the interlocutor, and I remain so still.

Lord *Eskgrove*.—There was a *probabilis causa litigandi*, and therefore I have doubts as to the interest, although I own that the lady ought to have got her money.

Lord *Justice Clerk*.—The lady wanted this money while Simpson retained it, and drew the interest of it: I consider this lady as under the necessity of borrowing money for her subsistence at every term that the feu-duty fell due. Simpson, on the other hand, did not keep this money ready for the claimants, as is clear from his defence; for he says, you have no right to demand money from me, you have more in your own hand due to me than I am due to you; and we have found that she had nothing in her hand.

Lord *President*.—It is well observed in the petition, that it is of no consequence in what way the money has been allocated; the defender had nothing to do with that. I confess I have doubts on this point.

Lord *Eskgrove*.—In the case between a landlord and his tenants, no interest can be given unless it has been stipulated by the lease.

The petition was refused. State of the vote, five to four.

|                                                                                        |   |            |                              |   |         |
|----------------------------------------------------------------------------------------|---|------------|------------------------------|---|---------|
| For the Pursuer, Mr. Solicitor General<br>and Wm. Tait,<br>Defender, Allan M'Conochie, | } | Advocates. | J. Walker, W.S.<br>R. Young, | } | Agents. |
|----------------------------------------------------------------------------------------|---|------------|------------------------------|---|---------|

Lord Droghorn Ordinary.

Gordon Clerk.

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LEASE.

## L E A S E.

I. JOHN LAIRD and Company, Merchants in Greenock,  
Pursuers;

AGAINST

WALTER GRINDLAY Farmer at Seabegs, and JOHN BUCHANAN Merchant in Greenock, his Mandatory, Defenders.

A lease excluding assignees and subtenants, may notwithstanding be put under the care of an overseer for the benefit of creditors.

## C A S E

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JOHN LAIRD and Company sublet to William Grindlay and his heirs, “excluding assignees and sub-tenants, without the consent of the said John Laird and Company, the corn and malt-mill, commonly called the Wester Mills of Greenock and Finnart, and the kiln for drying corn, &c. for the space of eighteen years from Lammas 1782.”

William Grindlay died in the 1787, during his lifetime George Henderson acted as miller; and the kiln was converted into a distillery, and possessed by James Blair and Daniel M’Keller. When Grindlay died his widow was allowed to draw the profits till her death, which happened in the 1788; and during that time Henderson continued to act as miller, and Blair and M’Keller possessed the kiln as formerly.

Upon the death of the widow, the creditors of Grindlay found that this lease was all that they had to trust to for payment of several hundred pounds; and accordingly different attempts were made to prevail upon the principal tacksmen to give the sublease to a person chosen by the creditors, and from whom they had reason to expect a grassum for the remaining years of that sublease. Laird and Company, the principal tacksmen, however, declined this, and brought an action of removing before the sheriff in August 1788, against Henderson the miller, and Blair and M’Kellar, all of whom had continued to possess as formerly. In this process there was produced a mandate from Charles Grindlay, dated in October 1788, and afterwards another mandate from Walter Grindlay, the immediate younger brother of William the subtacksmen. This last was dated in December 1788; and it empowered one of the credi-

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C A S E

I.



signees, the tenant has no power of assigning; and although perhaps in such a case a creditor might be allowed to adjudge, yet where assignees are excluded, the lease cannot be carried off even by the diligence of creditors. In order to make a lease the subject of commerce, it must be taken to the tenant and to his heirs and assignees.

There is no distinction betwixt the present subject and a rural tenement. The predilection which is supposed to take place in favour of the tenant in the latter case applies equally to the present; for as the principal tenants took the mills in question, merely for the purpose of commanding the water necessary for their other mills, the choice of a subtenant was an object of equal importance to them as the choice of a tenant in a rural tenement.

The judgements of the Court in similar cases support the plea of the pursuers. Thus in the case *Jamieson Durham v. Allan Livingston*, Fac. Col. (January 20, February 10, 1773.) The Court found, that a conveyance by a tenant to his creditors was ineffectual against the landlord, the lease excluding assignees and subtenants. And in another case, *Sir John Stewart of Castlemilk v. John and William Montgomerie* in the 1771, it was found that a conveyance or factory by Montgomerie the tenants, who had obtained a lease from Sir John, excluding assignees and subtenants, was ineffectual. It has thus been decided, that a lease on the same terms with the present cannot be conveyed by any device whatever.

The object of the pursuers was to prevent the farm from being transferred; and it was with this view that assignees and subtenants were excluded. But if the Court shall be of opinion that an express stipulation may be rendered nugatory, no landlord, however anxious he may be to retain a certain family in possession of his farm, can be certain into whose hands it may come.

Argument for  
the defender.

The question is, whether tenants, who hold their leases under an exclusion of assignees and subtenants, are entitled to hold possession without actual residence? It cannot be disputed that in some cases the residence of tenants is not usual; and when not expressly stipulated, the tenant may reside or not as circumstances may render it necessary. In a grazing farm there is often no place of residence for tenants; the farms are managed by overseers and herds, who are the mandatories of the tenants, and execute the business. It happens frequently too, that one tenant is the tacksmen of several farms, lying at a distance from each other; it is impossible that he can reside upon all of them, yet according to the pursuers plea these tenants ought to forfeit their leases. But this doctrine

doctrine has no foundation either in reason or in public expediency.

C A S E  
I.

There are particular circumstances, however, which take this case out of the general question: 1. The pursuers are not proprietors, and can have no *delectus persone*; punctual payment of the rent can be their only object. 2. The lease does not contain an unconditional exclusion of subtenants and assignees, but under this qualification, "without the consent of the said John Laird and Company;" and that qualification entitles the pursuers to withhold their consent only from an unreasonable conveyance of the lease. 3. Residence is not required, nor is there any place of residence for a tenant. 4. The subject in question is an urban tenement, and subject to the jurisdiction of the magistrates of Greenock; whereas the principle founded on by the pursuer applies only to rural tenements, Kilkerran and Falconer, January 1748, Aitchison v. Rannie, Bankton, Vol. II. p. 97. 5. The subject in question is a mill, and it is impossible to maintain that the business of a mill cannot be carried on by an overseer or mandatory.

With regard to the decisions founded on by the pursuers, Jamieson Durham v. Livingston they do in reality strengthen the plea of the defenders. Livingston had obtained a lease of a corn farm from Mr. Durham, excluding subtenants and assignees. On Livingston's bankruptcy the creditors took the opinion of the late Mr. Lockhart (afterwards Lord Covington), on the proper method to be followed for rendering the lease serviceable to them. The opinion was, "That as the lease secluded assignees, an assignation should not be granted; but that a person ought to be appointed manager, or factor for managing the farm." In place of following this method, Livingston conveyed the lease by a letter written by him, and which was held to be equivalent to an assignation; and upon this ground it was that the Court "repelled the defences, and decerned in the removing against Livingston and his assignee." Of this removing a suspension was brought; and although it was urged that the tenant was a mere statue on the farm, and that the lease was held by the support and for the behoof of the creditors, the Court, "in respect there was no proof that the tenant did not possess and manage the farm on his own account, found that he could not be removed." And, upon advising mutual informations, they "sustained the reasons of suspension." It was said to appear from accurate notes taken by one of the counsel in the cause, (now on the bench), that the ground of the decision was, "that though assignees and subtenants were excluded, yet it was material justice to allow the tenant to possess when assisted by his creditors."

July 27, 1774.

## C A S E

I.

The other case, *Sir John Stewart v. Montgomeries*, was not finally decided, and from the papers in that cause does not appear to have depended upon the general principle.

## Opinions.

Lord *Eskgrove*.—In a lease of this nature, the tenant must have an overseer, and his having one does not fall under the restriction in the lease; the exclusion is meant only to keep the management under the direction of the tenant. Is there then any difference to the heritor, whether the profits come to the tenant or go to any other person by his allowance? In this case the heir succeeds to all the rights which belonged to the predecessor, and if he could have appointed a manager, so may the heir. It is of no consequence that the profits go to the payment of the predecessor's debts, nor is it material that the heir perhaps allows the creditors to chuse the manager: In short, the only objection seems to be, that the profits are applied to the use of the creditors.

Lord *Swinton* observed, that the work of a mill must be done by a servant, and therefore the tenant may appoint a manager.

Lord *President*.—The restriction here is, that the subtenant shall neither assign nor sublet: call it what you please, it is virtually a prohibition to convey this lease. When a landlord sets a lease in these terms, I consider him as saying to his tenant, sir, in the event of your breaking, your creditors shall not enter into the possession of this farm; and surely if in the case of bankruptcy these clauses have no effect, there is an end of the clause altogether. In the case of *Sir John Stewart*, the judge who held the honourable place of President of this Court, said (as appears from notes) there was nothing to prevent the tenant from putting in a servant to manage the farm, but a faculty has been given, and that truly defeats the clause, and *Kaims* said, we are not to be deceived by words, we see the nature of the transaction.

Lord *Justice Clerk*.—When I decided this cause, I did not consider it as a *dolus malus* or *dolus bonus*, but as a case within the power of the parties; and that the heir, by endeavouring to pay the debts of his predecessor, was doing a laudable and a proper thing. If it be the object of the landlord to have his lands possessed by opulent tenants, it may be easily done; not by granting the lease to heirs, excluding assignees and subtenants; but by a clause, declaring a forfeiture in the event of bankruptcy: without that, unless the tenant be in the case provided for by the act of sederunt, bankruptcy creates no forfeiture of the lease. It is dangerous when the tenant dies bankrupt for the heir to enter into possession; and no person has a right to inquire whether the step be lucrative or not.

The

The heir is undertaking the trust, and managing the farm for the interest of the creditors, and for the honour of the predecessor, in doing so he does a laudable and proper thing. Suppose a lucrative lease, and the tenant bankrupt, the heir may enter *cum beneficio inventarii*, and it would be no objection to his obtaining the possession to say that he received no advantage, and therefore the lease must go to the landlord. The seclusion of subtenants and assignees affords no objection to a manager; many farms in this country are possessed by a manager where subtenants and assignees are secluded; here the heir has done right.

Lord *Monboddo*.—Lord Justice Clerk has defended his interlocutor against every thing that has or can be said against it.

Lord *Rockville* thought there was fraud. The younger brother gave the mandate, and said at the same time that he would take no charge; this is a strong circumstance to infer fraud.

State of the vote.

Adhere, Lord Justice Clerk, Eskgrove, Swinton, Monboddo, Dunfinnan.

Alter, Stonefield, Rockville, Dreghorn, Ankerville.

Carried adhere.

For the Pursuer, Claud Boswell,  
Defender, Ed. M'Cormick, } Advocates.

Laurence Hill, W. S. } Agents,  
James Horn, W. S. }

Lord Justice Clerk Ordinary.

Home Clerk.

Vol. X. No. 12.

## L E G A C Y.

I. Mrs. ELIZABETH GRAHAM, Wife of GEORGE LANG of Nether Glens, and him for his interest, Pursuers ;

A G A I N S T

JAMES DENNISTON, Esq. of Colgrain, and others, Trustees of the deceased ROBERT COLQUHOUN of Camstroddan.

A clause in a testament, discharging certain relations " of every thing they " may owe the testator at the time of his death," does not extend to the value of certain bills belonging to the testator, and sold at his desire a short time before his death, by one of the relations, although the money remained in the hands of that relation at the time of the testator's death.

## C A S E

I.

IN December 1770, William Graham of Glenney executed a settlement, whereby, after bequeathing certain legacies, he ordered his funds to be divided into three equal parts, one part to go to Mrs. Elizabeth Graham the pursuer, another part to Walter Graham, his brother, and the remaining part to Robert Colquhoun of Camstroddan his uncle ; and the deed contains this clause : " *Item*, I hereby leave all my brother, sisters, " uncle, and cousins, a free discharge of every thing they " may owe me at my death." Walter Graham and Robert Colquhoun were appointed executors ; the latter of whom took the sole charge on the death of the testator, which happened in March 1771.

Robert Colquhoun, the acting executor, having collected the funds, he made a division of them, and the pursuer received her share in terms of the settlement. This gentleman died in the 1776, and after his death an action was brought against his trustees, and also against Walter Colquhoun, his eldest son, who has for several years past resided in the West-Indies.

This action was founded on a letter addressed to the testator, by Walter Colquhoun the son. The letter is dated the 1st January 1771 ; a few weeks previous to the testator's death it says, " I yesterday got payment of your bills, with 4 s. 3 d. " of exchange, on 57 l. 10 s. at 3 s. 8 d. *per cent.* the others " were only taken at par ; so that the whole amounted to " 307 l. 14 s. 3 d. I paid to my father's cash-account L. 200, " and to my own, the balance . 107 l. 14 s. 3 d." And he adds, " in case you have occasion for any money, you may " draw on me for whatever you want." Taking this letter as evidence of the money's having been received, the summons states,

states, that it was not called for by the testator, and therefore remained a part of his funds at the time of his death. On this ground there is a conclusion against the trustees of the acting executor, and against Walter the son, as representing his father for payment of one third of the 307 l. 14 s. 3 d. with interest from the 1st January 1771.

The parties in this cause differed as to the situation of the testator from the time that the letter in question was written till his death. The pursuer, on the one hand, asserting that he was, during the few weeks that intervened, in so valetudinary a state, that he was incapable of attending to business, while the defender maintained that he was in the perfect use of his faculties, and able to transact business till within a very few days of his death. The defenders also rested their plea on the nature of the voucher. They insisted that it was no ground of debt, but a mere letter of instruction, the existence of which was in no shape inconsistent with the payment of the money. The money might have been paid up, either by Robert Colquhoun the father, (into whose cash account L. 200 of it is said to have been placed) or by Walter the son; and in either case the demand is ill founded. The difficulty of ascertaining these facts at this distance of time, and after the death of Robert Colquhoun, is to be attributed to the pursuer; and it is the more extraordinary that this claim should now have been brought forward, when it is considered that a settlement took place with Robert Colquhoun some years before his death, without any mention having been made of the present demand. To this the pursuer answered, that the claim was made the moment that the mistake was discovered; and as the letter fixes the receipt of the money, it is incumbent on the defenders to prove that it was repaid. This question therefore turned solely on the effect of the *legatum liberationis*; (the deceased Robert Colquhoun being the uncle, and Walter the Dec. 20, 1790. cousin of the testator.) The Lord Ordinary having "sustained" the defences, and found the defenders entitled to their expence," it was brought before the Court by a petition for the pursuer.

From Walter Colquhoun's letter it appears that the money in question came into his hands, not as a loan or debt, but merely as acting for Mr. Graham. Supposing then that the testator had died before the bills were negociated, will it be maintained that the bequest of a free discharge would have relieved Walter Colquhoun from delivering up these bills to the executors? These bills came into the hands of Walter, solely for the purpose of selling them, and remitting the money to the testator; he was a mere hand upon this occasion. Had the testator employed him to sell a horse, or goods, as his agent, they

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the pursuer.

## CASE

I.

they must have remained the property of the testator; and had they perished, been lost, or stolen, the testator alone would have been the sufferer.

Is it possible then to say, that Walter Colquhoun was owing the testator a thing which was in fact the testator's own property? The horse or the goods would have been as much the testator's own property as if they had remained in his own possession: no man can be said to be owing another unless the property has been transferred. The term in the Roman law, by which this contract is expressed, necessarily implies this; "Inde etiam mutuum appellatum est, quia, ita a me tibi datum, ut ex me tuum sit." It is even an absurdity in language, to say that Walter Colquhoun was owing a subject which he was carrying to sell, and in which he had no greater property than any servant would have had to whom it had been entrusted.

As the bills therefore belonged to the testator, so must the price of them. When a person sends a servant to receive money, assuredly betwixt the act of uplifting and the act of delivery, the money does not become the servant's, so as to afford only a *jus crediti* to the master, it continues his specific property. "Nam qui facit per alium facit per se:" and all that the pursuer maintains is, that the subject in Walter Colquhoun's hands was the property of the testator, and not a debt or *jus crediti* to him.

The clause which gives "a free discharge of every thing they may owe me at my death" can apply only to debts properly constituted, and due by the relation at the time of the testator's death; but the mere circumstance of effects being in their hands, cannot constitute a legacy, else these relations had only (when the testator was on death-bed) to borrow his horses or the stocking on his farm, in order to create a preference in their own favour.

But further, supposing it possible to have explained this clause so as to have covered the money uplifted by Walter Colquhoun, it could never be carried so far as to discharge the L. 200 which appears to have been placed to the father's account, without any communication with the testator. Certainly the testator could mean such debts only as were owing to him by his own consent, but by no means those, which a person, by any act of his, or of another, might incur without his knowledge; for thus any of his debtors might have destined the greater part of the testator's fortune to any of his relations whom they wished to favour; they had only to place the funds due to the testator in the hands of that person who might then have maintained the same plea which is urged by the defenders. This clause however can never admit of such a construction,

The

The plea of the defenders is as little to be reconciled to the obvious intention of the testator as to the legal import of the bequest. The testator divided his estate into three equal parts, which he gave to his brother, his sister, and his uncle, leaving nothing to his cousin; but surely he did not mean to alter this, and to take from the share of these near relations, and to add to that of this distant one, the sum of L. 307: had such been his intention, it would have been clearly expressed, and not left to any dubious interpretation of this clause.

Had the testator, with a view to bring all his funds into this country, drawn bills for the amount, and employed Walter Colquhoun to negotiate these bills, and had the whole proceeds been in his hands at the time of the testator's death, could this circumstance have rendered Walter Colquhoun his sole and universal legatee, so as to have defeated the rights, not only of the testator's brother and sister, but those of the special legatees? The defenders surely will not maintain this, and yet *maius et minus non variant speciem*. If the defender could not have carried off the whole, neither can he the sum in dispute.

The words of the settlement are exceedingly clear and simple; they bequeath to the persons there described what the civil law terms a *legatum liberationis*, by which, according to that law, all claims of debt, however constituted, and from whatever contract they arose, were discharged. The same is the law of Scotland, and whether a debt be constituted by a bond, a bill, promissory note, open accounts, or in whatever other way, it is discharged by such a legacy as the present; nor does it signify in what way the debt has become due, whether from lent money, or house-rent, or farm-rent, or the price of an estate, or a balance in the hands of a factor, or a claim for wages. In all of these cases, the defenders understand it to be clear, that if the creditor bequeath to the debtor what was owing to him, he discharges the debt; it is necessary only that it should be a debt; that it should be a claim, not for restitution of a subject, but for payment of a sum of money.

The pursuers however maintain, that a *legatum liberationis* discharges no debts but such as arise from the contract of *mutuum*; they have produced no authority for the distinction which they have attempted to establish, nor can any be produced; for neither in the *corpus juris* nor in Voet is there the least hint of any such distinction; and the defenders must be pardoned for thinking that no such distinction exists in the law.

When a person is due a sum of money, from whatever circumstance it arises, he is liable in a debt, he may be pursued for it, and it makes no difference whether the debt arises from

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one circumstance or another. The defenders shall not enter into a discussion of the meaning of the word "owe;" the meaning is perfectly understood, whether it be used in common conversation or in a legal deed. In the clause under consideration, the testator means to discharge all that he can demand by an action of debt.

The pursuers ask, whether the *legatum liberationis* would have freed the defender from delivering back the testator's horses which he held in loan; but who ever heard of owing a horse? The pursuers should recollect, that an action of debt is an *actio in personam*; an action for restitution of a subject an *actio in rem*. The former are discharged by a *legatum liberationis*, because the legatee is owing the money, and the legacy gives him that which he owes. But actions of the latter kind are not discharged by a *legatum liberationis*, because nothing is owing. Where a testator means to bequeath a subject in the possession of the legatee, he will do it in specific and proper terms.

Voet lays down this distinction, Voet comp. *De liberatione legata*, § 3. But the defender must be allowed to say, that neither in Voet, nor in any other writer upon the civil law, have they found any traces of the distinction laid down by the pursuer, where he says, that by a *legatum liberationis* the legatee will be free from every debt due to the testator upon the contract of *mutuum*, but upon no other. Therefore the defenders apprehend, that a bequest of this kind frees the legatee of all that he owed to the testator, in whatever way the debt may have been constituted, or from whatever transaction it became due.

The words of the settlement are broad and general; and it will be remarked how strong the expression is, the testator legates "every thing that they may owe;" and the words being so express, they must receive effect, unless the pursuer shall demonstrate that the testator did not mean to give so extensive a bequest; for the defenders do admit that *testatoris voluntas ante omnia est servanda*. But so far from the pursuer being able to prove this, the defenders apprehend, that there are various circumstances which show that the testator meant exactly what he has said in his settlement.

This settlement was executed on the 13th December 1770: The money in question was recovered on the last day of that month, the testator was informed of it the next day, and is desired to draw for it. He could not have forgot the *legatum liberationis*; yet he lives from the 1st January, that he received this information, to the 1st March, without drawing for a shilling. Had therefore the meaning of the words been obscure, the conduct of the testator would have cleared them up, and shown that he meant the money in question to remain with the defenders.

It

It has been said that Walter Colquhoun was no more than the testator's agent; and it may be true that he did negotiate the bills in that character. But after receiving the money, informing the testator of it, and desiring him to draw, he became his debtor; and the testator never having drawn upon him, it shows his intention that Walter should remain his debtor, and the letter remained a voucher of the debt.

The defenders have hitherto argued the case as if Walter Colquhoun had been the debtor, although it seems rather to have been Robert Colquhoun the father, that the testator meant to have received the money. The letter by Walter makes an excuse for not having paid in the money on account of the father; and if the testator gave orders to pay it in on his account, then unquestionably it was a debt due by the father, and fell under the *legatum liberationis*.

Lord Monboddo.—The bills were the property of the testator, and it makes no difference that they were turned into money: The property of the money is still in the testator; Colquhoun desires the testator to draw, and had he laid the money in his desk, it would have been as much the property of the testator as if it had been in his own repositories: But it has been said that this money was lodged in the bank, that will not alter the case.

Lord Eskgrove.—I incline to be of the opinion which has been delivered. This question was very long of being brought to trial, the original party is now dead, there were even clearances among the parties, and the defender is ignorant of the facts; had this action been brought earlier, these might have been learned. I therefore doubt if the action is now competent, but if it be, the question turns entirely on the meaning of this clause. The will was dated in December 1770, but it does not appear at what time the bills in question came into the hands of Colquhoun, the letter mentioning them, which is the only document, is betwixt the date of the will and the death of the testator; from that time he was labouring under the disease of which he afterwards died; I cannot suppose him to have been capable of doing business; I cannot expect him to have drawn for the value; no doubt if this man had lived, or had been in good health, after he knew of the money being in the hands of Colquhoun, this might have converted it into a debt, but as matters stand it is to be considered as a remittance; Colquhoun was no more than a hand to recover the value. If the contrary plea were good, it must have been equally so had these bills contained the whole estate of the testator; and what then must have happened, merely because the property had come into the hands of a person not a legatee, but falling under the general

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description of cousin, you must have defeated the testament. By this deed one-third went to an old sister, another third to a brother, and another third to Robert Colquhoun; would you then have listened to a plea which was to have the effect of carrying off the whole of this subject, and to have defeated that will? I cannot make a distinction betwixt a part and the whole. Besides the sum in question bears a great proportion to the whole of the estate (the total amount was only L. 2000 Sterling). This is not a mutuum, it is not a debt under the clause in the testament. But if the legatee had retained the property, and continued in possession, it might have become a debt, and been a ground of action: But that is not the meaning of the clause; the clause referred to such sums only as were impressed by the testator in the hands of his cousin, under the character of debtor to him. If the right to the money depends entirely on possession, then Robert the father, into whose cash-account L. 200 of the money was paid, has right to that sum, though it was lodged without knowledge of the father, though the father did not desire it, and although the testator knew nothing of the transaction.

*Lord Justice Clerk.*—This is a very unusual sort of settlement, I do not approve of it, the words are quite general: “I leave all my brothers, sister, uncle, and cousins, a free discharge of every thing they may owe me at my death.” These words are so general as to include every claim of whatever kind it may be: I do not distinguish by what contract it arises; this is a debt to all intents and purposes. There is a mistake in saying that the father has any right; the son remains the sole debtor to the testator, and is a creditor of the father’s for the money he put in on his cash-account.

*Lord Swinton* observed, that there were two months betwixt the date of the letter and the death of the testator. There is a letter in the appendix, written by the testator, dated about a month and a half after the testator knew of the money’s being drawn by young Colquhoun. Now when I see this, and consider the words of this testament (read them), I must hold the produce of these bills to be a debt due to the testator; it is due by Walter Colquhoun, not by the bank, and had a loss happened by the insolvency of the banker with whom the money was deposited, it would have been a loss which must have fallen upon Walter Colquhoun, unless it can be shown that the money was lodged in the bank, and an order transmitted to the testator, empowering him to draw it.

*Lord Justice Clerk.*—Put the case, that a creditor of Walter Colquhoun’s had used arrestments in the hands of the banking-house, where the money was deposited, and a competition had arisen with the testator, the creditors of Walter Colquhoun must have been preferred.

Lord

**Lord President.**—This is a singular case ; I own I have difficulty, though I am of the opinion first given. It would be a very extraordinary thing to constitute a legacy in this way ; there was no loan, it proceeded from mere accident. After the bills were negociated, Walter Colquhoun, without directions, put the money into his cash-account at a time when the testator was ill of the disease of which he soon afterwards died. Had matters come to a settlement, and a voucher been given by Walter Colquhoun to the testator, for this balance then he would have become debtor to the testator, but matters did not come to this, the money was deposited only until he should receive directions in what way it was to be disposed of ; it was a mere temporary application, not a loan ; that is the light in which it appears to me. Another thing that appears strange, this is an action against Camstroddan and his son, and the son is a party ; as there is no appearance for him, decret should go against him, and yet the judgement gives the money to the father's trustees.

**Lord Monboddo.**—The money when put into the bank remained the property of the testator ; and I cannot distinguish betwixt a part of the testator's property and the whole ; this is not a debt, it is a part of the testator's estate.

State of the vote, adhere or alter.

Alter, Lords Eskgrove, Dreghorn, Monboddo, Stonefield.

Adhere, Lords Justice Clerk, Swinton, Ankerville, Dunfinnan.

Carried alter by the Lord President's vote.

“ The Lords repel the defences pleaded in this action, and remit to the Lord Ordinary to proceed accordingly.” Judgement.  
June 22. 1792 .

Against this judgement a reclaiming petition was presented, which was refused without answers. Lord Eskgrove observed that there was a difference betwixt a debtor and a depository : That the whole estate might have been in the hands of Walter Colquhoun, and the settlement in favour of the mother, sister, and uncle, thereby defeated.

|                                   |            |                     |         |
|-----------------------------------|------------|---------------------|---------|
| For the pursuer, Dav. Cathcart, } | Advocates. | Arch. Tod, W. S. }  | Agents. |
| Defender, Ar. Campbell, }         |            | Ja. Dundas, W. S. } |         |

Lord Ankerville Ordinary.

Hume Clerk.

Vol. X. No. 13.

II. GEORGE

## II. GEORGE BROWN, Pursuer;

A G A I N S T

ROBERT COVENTRY, Defender.

A general disponee was burdened with a legacy, which, failing the legatee, was to go to the general disponee. The legatee having survived the testator, the legacy was found to vest in the heirs of the legatee, although the legatee had not confirmed: and they were accordingly preferred to the general disponee.

## C A S E

II.

IN the 1782, David Barclay executed a settlement in favour of Robert Coventry his nephew, naming him executor and general disponee, under the burden of certain legacies, and among others one of L. 100, to be divided in certain proportions betwixt Rachael and Janet Barclays, his nieces “in liferent, for their liferent-use only, and the heirs to be “lawfully procreated of their bodies in fee; whom failing, to “the said Robert Coventry (the disponee), and his heirs, “&c.”

Rachael Barclay, to whom the liferent of L. 60 of this sum was provided, married George Brown the pursuer; and there was a daughter of this marriage. Janet Brown, the daughter, survived the testator, and was consequently entitled to the fee of the sum bequeathed. On the death of Rachael Barclay, the mother and liferentrix, George Brown, father and administrator-in-law of the said Janet Brown the heir, pursued Coventry for the legacy: and it was found by the Court, that on his completing his daughter's title by confirmation, Coventry was bound to pay.

While Brown was proceeding to complete the title in the person of his daughter, she died. He then expedite a confirmation of the debt in his own name, as executor to his daughter, and brought an action against Coventry. This action was raised before the sheriff of Kinross; and the sheriff having decreed for the legacy, with the interest due on it, the cause was brought into the Court of Session by advocacy, when the Lord Justice Clerk, as Ordinary, remitted the cause simpliciter \*. Against this judgement, Coventry the defender presented a petition to the Court.

\* That is to say, adhered to the sheriff's judgement.

The question is, whether the express substitution in favour of Coventry is to have effect? The words are sufficiently clear, nor can there be any doubt as to the *voluntas testatoris*. It has been long settled, that the words, "whom failing," comprehend both conditional institution and substitution, Dict. Vol. II. p. 395. But in this case they cannot import any thing but a substitution, for Coventry being general disponent. There was no occasion for a conditional institution to have given him a right to the legacy, on the event of its lapsing by the legatee's predeceasing the testator.

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Argument for  
the defender.

In the civil law, it was a principle, that a person could not name an heir to his heir; and therefore all substitutions were rejected, except what were called pupilar substitutions, and some others similar. And although the genius of our law in this respect differs from that of the civil law, we having early allowed of substitutions in heritable succession, yet our respect for the civil law occasioned some hesitation in the admission of the rule in cases of moveable property. Hence the old doubt as to bonds with substitutions; when that was got over, still some hesitation remained with regard to legacy. But the true genius and principle of the law of Scotland soon prevailed; and by a decision pronounced above a century ago, it was settled that substitutions in legacies were effectual. Stair, 13th July 1681, and Dict. Vol. II. 395. In this case a father appointed his daughter his executrix, and failing her by decease, David Christie, on her father's death she confirmed his debts; the Lords found, in a competition between her executors and Christie, that it was a tailzied succession and proper substitution, and so preferred Christie.

The same question occurred, and was decided in the same way in the case of Campbell v. Campbell and M'Millan, 12th June 1740, collected by Kilkerran *voce* Substitution, and by Lord Kaims, in his remarkable decisions. Part of the argument for the substitute, from the remarkable decisions, has been quoted on the other side; and it has been said, that, from a note subjoined to Lord Kilkerran's report, it appeared to be the opinions of the judges, that the Court had gone too far in Christie's case when they preferred the substitute to the heir of the institute, who had made up titles by confirmation. But this observation does not apply to the present case, for here there was no confirmation. Besides, the remark may be supposed to have been founded on another ground, as the question in that case was, with a posthumous child of the testator, and the condition, *si sine liberis*, may well have created a doubt in the 1740, when only two years before, in the 1738, the Court had found that the condition *si sine liberis* was an implied condition. C. Home, No 104.

Fur-

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II.

Further, Lord Kilkerran, p. 524, in reporting the case, Sir William Binning v. the creditors of Sir James Campbell, says, that "we have begun to give substitution effect, even "where the institute has become heir *et postea decesserit*;" and he refers to the case of Christie, and to that of Campbell v. M'Millan, as the ground of the opinion.

Lord Stair, after stating that the substitute in a bond will succeed on the failure of the institute, if the institute has not altered or prejudged the substitution, adds, that the same takes place in legacies, Stair, inst. p. 501. Dirleton, under the title *substitution in legacies*, seems to incline to the doctrine of the civil law in regard to legacies, but this opinion is corrected by his commentator, p. 283. And Erskine, after stating the Roman law, and our older law lays down the same doctrine as that of our present law, B. III. tit. 8. § 44.

Under these authorities it must be held as a settled point, that substitutions in testamentary bequests and legacies are effectual, and there is nothing in this case which ought to form an exemption from the general rule; the testator's intention is clearly in favour of Coventry, and from the circumstance of his being the general disponent, it is impossible to suppose a conditional institution.

Had the testator said, that in the event that the children of his niece die before disposing of the sum bequeathed to them, the right of that sum shall devolve on Coventry; there can be no doubt that he would have been entitled to the legacy, in the case which has happened; but the words that are used are equally clear and explicit.

As the substitution in favour of Coventry is a mere destination, Janet the institute, had she lived, might have disposed of the money otherwise; even had she come to the years of discretion, and uplifted the money, without having disposed of it by will, there might have been a question, but she died an infant, and there could be no alteration by her, either express or implied.

The legacy remained in the hand of Coventry; and it would have made no change on the question, although it had been paid over to her administrator; for payment exacted by a tutor can never evacuate a substitution, nor make any alteration on the pupil's succession. A variety of decisions to this purpose are collected in the dictionary under the title *Minor*, Dict. I. 577. and under the title *Tutor and Pupil*, Dict. II. 490. Besides these cases, there is one pretty much in point reported by Stair, 23d February 1663, James Aikenhead v. Aikenhead. Ersk. Inst. 7. § 18.

Besides, the general rule of law, the special nature of the case, and in particular, the testator's predilection for Coventry, show that the administrator of the infant could not, by

up

uplifting the sum, alter the substitution. The case of *Stevenson's trustees v. Graham* has been founded on by Brown, but it does not apply; it was decided both here and in the House of Peers upon specialties; in so far as the rules of substitution enter into that question, they are in favour of Coventry, for the Lord Ordinary's judgement, and the first judgement of the Court, proceeded on the ground of substitutions in legacies being effectual.

On the question at issue, there are decisions and authorities on both sides, and it is a question that deserves to be well considered. If a substitution be at all admitted, a series of substitutions must be admitted. But this requires a subject of a permanent nature; this is not the case with a debt or a sum of money; these are liable to continual change, and to be altogether lost. Supposing a debt due by a bond containing a substitution, when the debt is paid, the bond is cancelled; if the creditor die after receiving payment it is difficult to perceive what sort of title the substitute could make up. He could not serve heir of provision under the bond which no longer exists, nor could he make up a title to the debt, for that is extinguished; neither could he make up a title to the sum due by the bond, for after payment to the creditor it can no longer be traced; or suppose the creditor to have left only a land estate, it is clear that the substitute could have no claim; the sum itself is gone, and the substitute could not claim against the heir, for that would suppose him to have not only a *spes successionis* but a *jus crediti*, and of consequence a claim of damage in the same way with the heir of a marriage, but this is not pretended.

Coventry must therefore admit, that when the legacy is paid the substitution is at an end. But this affords an answer to his whole plea, for according to this doctrine the effect of the substitution rests on the will of the testator. Now, if a legacy with a substitution is payable at a certain term, the testator must have meant the legacy to have been paid at that term; but if the substitution is at an end by payment, does it not necessarily follow, that at the term of payment the testator meant it should be at an end?

This observation seems to apply in a peculiar manner to the case of a legacy payable by an executor, whose office, as Mr. Erskine expresses it, " goes no further than to gather in all " the funds of the deceased instantly payable, in order to their " distribution amongst those having interest in the moveable " succession."

Coventry seems to resolve the effect of payment in vacating the substitution into the presumed will of the institute; but this is not a solid ground; the institute may take up the money from distrust of the creditor, or from other causes, with-

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Argument for  
the pursuer.

## CASE

## II.

out the least view to his succession. On the other hand, he may allow the money to remain from confidence in the debtor; besides, the debt may be paid without the content of the institute. The executor, where he is debtor, must pay at the time specified; it would therefore be unreasonable to make the right of third parties depend upon such circumstances.

Coventry admits, that the law of Scotland, in the same way with the Roman law, disallowed of a tailzied succession in the case of sums of money; but he says the law has been altered, and in proof of this he refers to two decisions, Chrystie, 13th July 1631, and Campbell, 1740, collected by Lord Kilkerran and Lord Kaimes: but Lord Kilkerran observes, that the first of these cases was thought to have gone too far; and his observation, it is obvious, had no relation to the condition *si sine liberis*, as Coventry would understand it; in the other case the Court appear to have been much divided.

The opinion of Dirleton is decidedly against the substitutes in legacies; and Sir James Stewart, who delivers a different opinion, concludes with saying, "but this needs further consideration." Which likewise shows that Sir James did not consider the point to be fixed by Chrystie's decision.

The other writers on our law rest their opinions entirely on these decisions, and in effect go no farther to establish the point than the decisions themselves; and in the last case that occurred, the trustee for Stevenson's creditors v. Jean Graham, determined so late as the 9th February 1790, the Court appear to have approved of the Roman law respecting this matter: it is in point with the present question, and so it was understood by the Lord Ordinary in this case, who was also Ordinary in that question. Coventry indeed endeavours to evade the application of this decision, by alledging that it went solely on the intention of the testator, as appearing from the will. But the pursuer has no access to know the precise grounds of the judgement; and he is inclined to rest on the opinion of the Lord Ordinary, as affording a truer and more impartial account of it than is given by the defender.

Besides the defender's argument on the general question, he contends that the intention of the testator in the case which has happened was in his favour: But this is begging the question. There are no words in the deed to favour this opinion. He admits, that "whom failing," comprehends both conditional institution and substitution; and a substitution is not to be presumed when the words admit of the other construction. Limitations are not to be extended: Therefore the defender cannot show that a substitution was meant. Bankton says, that in a substitution of a legacy the substitution vanishes if the legatory outlives the testator, Vol. II. p. 388. § 44. On these grounds, independently of the circumstances of the case, the pur-

pursuer tests his hopes of a favourable decision. The testator having given the bulk of his fortune to Coventry is no proof that he meant to give him the whole; on the contrary, he is burdened with the legacies; and it is more natural to suppose that the testator meant them, failing the legatees, to go to his own next of kin.

It is not disputed, that had the legacy been paid to Rachael Barclay, the substitution would have been at an end: A demand of payment ought to have the same effect, L. 39 de reg. jur. Fountainhall, 20th January 1697, Laird of Scotland and his lady v. Drummond of Innermay. Dict. Vol. I. p. 191.—L. 161 de reg. jur. Erskine, B. III. tit. 3. § 85. Bankton, Vol. I. p. 98. § 53.

The defender prevented the pursuer from recovering payment by every means in his power; it was therefore the defender's fault that the legacy was not paid. But the defender says, payment would have made no difference on the question; neither the infant nor her administrator could have made any change on the right of succession. The decisions on this head cited by Coventry it is unnecessary to examine, because the question seems to have been completely decided by the decree of the Court, ordaining the defender to make payment to the pursuer, as administrator for his daughter, and refusing to allow the money to remain with Coventry on caution, or to force Brown to find caution to repay the money, in case the institute should die before she should be capable of defeating the destination.

Had the defender paid the money to the pursuer, there would have been no question as to whom it would now have belonged; and as this was not done, through Coventry's fault alone, the claims of the parties ought to be viewed as if the payment actually had been made to the pursuer.

Lord Eskgrove.—It is not proper in every case of this kind to make a general rule. Without entering into the Roman law, or the decisions from Durie's time downwards, as affording a precise rule, I shall go to the destination itself (read the destination). This destination must be explained in the way most beneficial to the institute. The liferent to the two sisters is clear, the fee is given to the heirs of their bodies, and it is certain that the testator meant to give this fee as amply as possible. As to the nieces, when Rachael died there were two children, one died before the other, and it is of no consequence here how the legacy would have been divided had both children lived: But from the moment of the mother's death the fee vested in the child or children. No form of law was necessary for vesting this right in the children; it was sufficient for them to prove that they were the children of the liferenter,

Opinion.

CASE

II.

if that had been denied. It having been vested in these children, the question is, what was the testator's intention should these children die? In this case, whatever the principle of law may be in others, the children are to be considered as institutes. They were not named, and perhaps did not exist at the time of making the testament; and the intention of the testator seems to have been, that if there should be no children, Coventry should succeed; but I am of opinion, on a fair construction of this destination, that Coventry was only a conditional institute.

The surviving child died before confirmation. Much has been said on the effect of confirmation; and I hold the effect of it to be such, that where it is a form necessary for vesting the sum in the institute, the subject must go, in case of the institute's death, without having completed that form, not to her heir, but to the substitute. Thus, in many cases where services are necessary, the same rule is followed. But on the other hand, I hold, that where no form of law is necessary for vesting a subject, it is as effectually vested *ipso jure*, as in the case where a form of law is required, and has been complied with. Now, in the case of a legacy, where the form of vesting is complied with, and the sum vested, the substitution is done away. In the case of a destination of a land estate the law is different. It is there necessary to show an intention in the institute of altering the destination before the substitute can be disappointed. But in the case of a testament or a legacy, the destination is altered by the mere vesting of the subject, and the executors of the institute entitled to succeed. Suppose that the institute in this case had received the legacy, would her representatives have been obliged at her death to muster up a sum and pay it to the substitute? no surely: When it has once vested, the sum legated is out of the substitution. But there were here circumstances equivalent to the uplifting of the legacy. Thus Coventry maintained a litigation, and suspended the operations of the administrator for the pupil, and prevented him from receiving the money; it is the same then as if the money had been recovered, and mingled with the effects of the pupil.

Lord *President* asked the council, whether Coventry the general disponent had been confirmed?

The counsel answered that he did not know how that fact stood.

Lord *Fiskgrove*.—If there was confirmation at all it was available to every legatee.

Lord *President*.—His Lordship said that he would take it for granted that Coventry had confirmed.

Lord *Monboddo*.—This case involves a very general question, whether the Roman or the feudal law is to be the rule in such a case? There was no proper substitution in the Roman law, excepting in the case where the institute died in pupilarity (could not hear his Lordship).

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The legacy is granted to the niece in life, and to the children of the life-tenant in fee. The children survive the testator and life-tenant. They have no need of confirmation or service. I never heard of a legatee serving or confirming. The child, if of age, might have taken up the money. The circumstances which took place are equivalent.

Lord *President*.—This is a conditional institution. I am glad that the question has occurred, that it has been heard, and is now to be solemnly decided; it will explain cases that hitherto have admitted of doubt.

The first precedent is that of *Chrystie*; it appears from *Kilkeran's* accurate report that this was given up on all hands as an erroneous decision. Indeed there is no ground on which it can rest. In *Campbell's case v. M'Millan*, there was not, as in the one now before us, a special legacy, but a general disposition by a son to his father, and in case of his father's death to his sister. The question was, whether, in the case of a general disposition, the property was fully vested in the donee *ipso jure* without any formality? A distinction was made in a decision *Laing v. Neal*, December 1740. It was there said that a general disposition confers a *jus ad rem*, and enables the donee to pursue, but that it gives no *jus in re*, that it does not *eo ipso* vest the subject, so as to transmit it to the executors of the donee. I do not know whether this was a just decision; I suspect that it was not well considered, and I wish to see it re-considered. In *Campbell's case* the disposition was to the father, and on his death to the sister; the first general donee died before confirming, and therefore, unless the subject vested *ipso jure*, the succession was in *bonis* of the original proprietor; and the question should have been, whether it went to the conditional institute? The Court thought the sister a substitute, without going into the question, whether the effects had vested in the father, or were in *bonis* of the disponent, and they gave them to the sister without saying upon what ground: But here there is no such question, the right vested in *Coventry*, as trustee or executor for all concerned, and the right of action was competent to the mother for her life, and to the children for their fee, against *Coventry*, in whom the whole succession vested.

“Whom failing,” applies both to conditional institute and to substitute; but the presumption always is in legacies that it is an institution. The case of a tailzied bond may be conceived, they do often exist; and where a bond is tailzied to a certain series of heirs, it is taken up by service, not by confirmation: But in legacies, unless there are express words tailzing the legacy, and ordering it to be taken up by service, it vests *ipso jure*. The question was well stated by Lord Monboddo, whether this case is to be decided by the

CASE

II.

feudal or by the Roman law. In legacies it must be by the Roman law, unless the testator has made a feudal subject of it. I am for adhering to the interlocutor.

Lord *Dreghorn*.—I am of the same opinion. The Roman law must regulate this question: where the term of payment of a legacy is fixed at the first Whitsunday or Martinmas after the testator's death, he surely understands that payment is to be made then, nor is it of consequence whether it be truly paid or not, the decision must be the same.

Lord *Justice Clerk*.—I gave my interlocutor on the general point, and I hope the question will now be fixed. By the Roman law no man could make a settlement for his heirs; and the rule there was, that the substitute was to succeed only *si heres non erit*. That is not the law of Scotland; it is in the power of the testator to make a substitution if he declare his intention properly, or he may add a clause to make it clear; but none such appears in this case. What then is the presumption? In a settlement of land, which is permanent, it must be presumed that the substitution was intended to take place *quandocunque heres decesserit*. But in the case of money, the intention is that it should be used; there can be no presumption that it is meant to be a permanent estate, that must be expressly declared. Where a legacy is left, it is the intention of the testator to give the same to the legatee, and his will should be complied with. The legatee should have his subject. If the money be lifted, the legatee is not bound to lay it out in terms of the substitution: When in the legatee's pocket the destination flies off.

I have great veneration for Dirleton, and respect for his opinion; and Stair does not differ from him. Contracts of marriage do not enter into the question, every thing relative to them depends on the contract; the will of parties regulates the succession.

Where bonds of borrowed money are taken to the creditor, and failing him to another, the *jus crediti* vests in the creditor from the date of the bond, and the right of the substitute may be defeated.

- This question has been decided on a full consideration of the principles of law, and from the opinions of the Court; I hope it will be at rest in time coming.

Lord *Esqgrove*.—Then the Lord Justice Clerk's opinion is, that a man may make a proper substitution in money; but that when the intention to do so is not clearly explained, the Roman law must regulate the question.

Lord *Justice Clerk*.—That is my opinion.

Lord *Esqgrove* mentioned Lady Emilia Halket's case.

"The Lords having resumed consideration of this petition, &c. and heard parties procurators, &c. they advocate the cause, find the petitioner liable to the respondent in the sum of L. 60 Sterling, with interest from 14th March 1786, and in the expence of extract."

CASE  
II.

Judgement.  
June 2, 1792.

For the Pursuers, Ad. Rolland, } Advocates. David Lister,  
Defenders, Math. Ross, } W. M'Donald, W. S. } Agents.

Lord Justice Clerk Ordinary.

Sinclair Clerk.

Vol. X. No. 14.

## MANDATORY.

I. ROBERT GRANT, Bow-maker in Edinburgh,

AGAINST

THOMAS M'LEAY, Writer in Edinburgh.

An agent having completed a title to a debt in such a manner as to give rise to an objection, which, although at first repelled by a judgement of the Inner-House, was afterwards sustained. He was absolved from an action brought for recovering the damage which had been incurred by his employer.

DAVID MARSHALL writer in Edinburgh, conveyed his whole property to his wife, Catharine Naysmith, by a general disposition. Catharine Naysmith, having survived her husband, executed a latter-will, by which she bequeathed her whole moveables (including those she succeeded to under her husband's disposition) to Robert Grant the pursuer.

CASE  
I.

Amongst these was a bond for L. 110, granted by Robertson of Bedlay to David Marshall; and the pursuer finding it necessary to make up a title to this debt, in order to adjudge the estate of the debtor, amongst with the other creditors, this business was committed to Thomas M'Leay the defender.

The method followed by Mr. M'Leay was this; he got Robert Grant decerned and confirmed executor to Catharine Naysmith, he narrated the general disposition by Dav. Marshall, and gave

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I.



gave up this bond in the inventory: upon that title he led an adjudication against Mr. Robertson the debtor.

When this adjudication was produced in the ranking the common agent stated this objection to it, that as Catharine Naysmith had not confirmed the debt, it still remained *in bonis* of her husband David Marshall, the original creditor; and that as she could not have conferred an active title upon Robert Grant, neither could the commissaries transfer a right which was not in her. The Lord Ordinary in the ranking repelled the objection, and this judgement was adhered to by the Court, upon advising a reclaiming petition and answers. But the cause being brought a second time before the Court, that judgement was altered, and the objection sustained; and in consequence of this decision, in place of drawing full payment, Robert Grant drew only L. 12 Sterling.

Argument for  
the pursuer.

Upon these facts Robert Grant brought his action against Mr. McLeay, concluding for payment of the principal sum and interest due by Bedlay's bond, deducing the L. 12. In this action the Lord Ordinary, on the 1st July 1790, "affoizied the defender, and decerned." Which judgement was brought under review of the Court by petition.

By undertaking the business, the defender professed himself capable of conducting it in a proper manner; and there would be an end of all confidence, if he were in this situation to be allowed to commit the grossest blunders with impunity. Suppose a man employed to lend out a sum of money on heritable security; and that he neglects to record the investment within the sixty days, he surely would be liable for the loss; and there is no difference betwixt that case and the present.

Accordingly, several decisions are to be found where the Court proceeded upon the principles upon which the pursuer rests his plea, (*Dict. voce Reparation*). As an instance, "a writer to the signet having received a bond from a party to raise horning and caption upon it, and he delivering it to a messenger for that end, who denounced it before the lapse of the six days, gave it in to be registered, and returned it marked to the writer, who thereupon writing out a caption, in which in common form he says, that the debtor was orderly and legally denounced rebel, and thereon the said debtor being incarcerated, and upon summary complaint of the riot, getting the party fined in L. 20 Sterling of damages to him, and then the party pursuing the writer to refund what he had so paid. The Lords found the writer liable to relieve the client. Forbes 28th, Fountainhall, 29th November 1710, Wood v. Fullarton."

It has been said, however, for the defender, that the first judgement of the Court supported the title in question. But it appears

appears from the collected case, that the majority of the Court disapproved of the method of completing the title, and that those who supported the other side did so, on this ground, that the "confirmation, however erroneous, not being brought under reduction, should have full effect." But be this as it may, it is the duty of an agent, entrusted with making up his employer's titles, to make them up so as to avoid every possibility of challenge, and when by neglecting to do this, the employer suffers a loss, it is in vain for the agent to defend himself, by saying that the question in which he has involved his client, was a point of law, attended with much difficulty. Where an agent is employed to make up titles, and has it in his power to do it in an unexceptionable manner, if he fails he must be liable for the consequences, more especially where the form of proceeding is ascertained by law and uniform practice; for where a professional man, acting for hire, deviates from common practice, he does so at his risk; here the defender needed not to have been under any difficulty, he had two modes of vesting the bond in question in the pursuer, either by a confirmation to David Marshall, or by getting a bond of corroboration from Bedlay \*.

Argument for the defender.

The defender has no occasion to controvert the general doctrine, that a person who undertakes a piece of business for another, and is guilty of fraud or gross negligence, or of such a degree of *imperitia in sua arte*, as comes near to the *culpa lata qua dolo equiparatur*, must be liable in damages. It is not easy to frame a general rule; where there is fraud, there can be no difficulty; neither can there be any where the person is *versatus in illicito*, for instance, where he has been guilty of a *furtum usus*; and the question must be equally simple where the person has deviated from his instructions, or left undone a piece of business which he engaged to perform. But where the negligence is inconsiderable, or where a mistake has happened in an intricate and difficult piece of business, it becomes a question of much nicer discussion; and if the defender shall have conducted himself not only faithfully and diligently, but with such a degree of skill and ability that the Court were much divided upon the question of the incompetency of his proceedings, it would be contrary to justice to subject him in the damages pursued for.

The pursuer has quoted a case, *Wood v. Fullarton*. But that case, and several others which the defender shall mention, turned upon this, that the person employed was guilty, not of an error of judgement, but of palpable neglect. There

\* See *M'Kellar v. M'Math*, bankrupt, No. 1.

CASE

I.

the writer neglected to examine the executions, or he could not have failed to discover the mistake. But even that, Fountainhall says, "was looked on as a new decision." In the case of *Rae*, collected by Lord Kilkerran, p. 484, the Court found a writer liable in damages for having neglected to expedite a bill of suspension which had been passed. In the same manner, in the case of *Goldie v. McDonald*, 4th January 1757, the Court gave damages against a writer, who being employed to expedite a confirmation, neglected it until his client died, by which means the widow was excluded. Again, 14th February 1787, *Mason v. Thom*, the Court found damages due by the man of business for neglecting to lead an adjudication, by which neglect the debt was lost.

In all of these cases the neglect was gross and inexcusable, and damages were justly found due. But even in questions of this kind, where the negligence is not greater than what must often take place amongst men of business, the Court does not give damages. Thus, in a case *Bain v. McKenzie*, damages were refused where the writer had delayed to expedite a confirmation, by which means the heir of the person who ought to have been confirmed was excluded by his death without a title having been made up, the *mora* not being greater than may reasonably be supposed to take place.

In the present case there was no *dolus malus*, not even *mora*, for no time was lost in completing the pursuer's title. The sole ground of complaint is, that the defender formed an erroneous opinion upon a point of law, attended with very considerable difficulty. The intricacy of the case cannot be doubted, when it is remembered, that the Court not only pronounced opposite judgements upon it, but were at last considerably divided upon the question; and it is not a little surprising, that after all the pursuer should have pointed out two ways of completing his title, neither of which would have been effectual; for as the pursuer was neither nearest of kin, to Marshall the original creditor, nor his executor nominate, nor his creditor, it does not appear upon what ground he could have applied for a confirmation; and as to the bond of corroboration, it would unquestionably have had no effect.

When therefore there has been no wilful error, and when negligence and carelessness are not alledged, it would be contrary to justice, and to the decisions of the Court, to subject the defender to damages. How many blunders have been committed in making up fictitious votes, Tailzies and deeds of settlement have been set aside contrary to the *enixa voluntas* of the granters: Nor are there wanting many instances of marriage-settlements, where the claims of the wife have been found

found ineffectual in a question with creditors, yet in none of the many cases of that nature which have occurred has there been one instance where the man of business was rendered liable in damages, unless where it arose from fraud or negligence, or gross *imperitia*; were it otherwise no man would undertake the management of such affairs. The defender shall conclude with mentioning the circumstances of a case which happened so late as the 1770. The case has not been collected. It was an action at the instance of Archibald M'Harg, for payment of the expence which he had disbursed in making up a title to the estate of Nethercraigonbay, in the person of M'Lamerick his client. The defence was, that the title had been erroneously made up, M'Lamerick having been served heir in general to his grandfather, in place of heir of provision in a contract of marriage. But Mr. M'Harg having shown that it was a question of difficulty to decide in what character M'Lamerick ought to have been served, the Court repelled the defence.

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I.

M'Harg v.  
M'Lamerick.

Lord *Eskgrove*.—This is a very different case from that of Thom's, where an ignorant man had put papers into the hands of Thom for the purpose of leading an adjudication, and nothing was done, by which the debt was lost. Here all the steps have been taken which were necessary to give effect to the claim, what then is the ground of complaint? That M'Leay gave improper directions to the commissary clerk. But this direction was approved of by a majority of the Court, and can I subject any gentleman acting as an agent before this Court, for doing what your Lordships approved of, until the question came a second time under your consideration? the burden of the office of an agent, were this law, would be intolerable.

Opinion.

Lord *Swinton*.—There is an allegation that Coldstream told M'Leay that the method was wrong, which is the only difficulty I have in the case.

Lord *President*.—There was a letter quoted in the former petition, which went far, in my opinion, to prove that Mr. M'Leay knew that the mode was erroneous. But perhaps one should not take one part of a letter without the other, and Mrs. Grant did not agree to the mode proposed by M'Leay. At the same time I suppose there was some neglect. This is not a new case, Thom neglected what he should have attended to: Cunningham ought to have led an adjudication, but he neglected it, and was found liable in damages: Goldie at Dumfries should have expedited a confirmation, which he neglected, and was found liable in like manner. And in the case of a writer at Eccles, your Lordships, on the 2d March,

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found

CASE

I.



found him liable for not doing diligence. In the very next case in the order of the roll, that of Romanes, you have found him liable, because the messenger did not execute the diligence properly. These are strong cases. In the papers it is attempted to assimilate this to the case of erroneous advice given by a counsel: But the cases are very different; this man undertakes to execute a piece of business, a counsel or judge may err in judgement without being liable in damages.

Lord Justice Clerk.—This case is different from those mentioned by the Lord President; and I will venture to say, that before this question was agitated, a hundred practitioners in this House would have done the business in the very same way that M<sup>r</sup> Leay has done.

Judgement.  
Jan. 1. 1791.

“ The Lords find, that, in the circumstances of this case,  
“ the defender is not liable, and therefore adhere to the in-  
“ terlocutor of the Lord Ordinary reclaimed against, and re-  
“ fuse the desire of the petition.”

And upon advising a second petition, with answers, the Court adhered to the above judgement.

For the Pursuer, Mr. A. Wight  
and Ja. Grant,  
Defender, Wm. Tait,

} Advocates, Isaac Grant, C.S.  
James Smith, C. S. } Agents.

Lord Stonefield Ordinary.

Menzies Clerk.

Vol. IX. No. 3.

MEDITATIO

## MEDITATIO FUGÆ

I. CHARLES MAXWELL-CAMPBELL, late of Skerrington,

AGAINST

Captain JAMES MONTGOMERY.

A *meditatio fugæ* warrant may be issued against an officer going abroad on service.

In objecting to an account of expences, an objection was made to the expence of a *meditatio fugæ* warrant issued against Captain Montgomery. It was said to have been very improperly obtained in this case, where the person against whom it was issued was an officer going abroad to join his regiment, not a person flying from his country. That the public service required him to leave this, and the warrant, when issued against him, was therefore peculiarly oppressive; that it could not proceed from a desire of recovering payment, for the effect of it, if carried into execution, must have been to ruin him: Had he been detained here he must have lost his commission, and every chance of recovering payment would then have been cut off. Thus the object of the creditor evidently was to gratify revenge, not to procure payment of a debt, an object to which the law will not give its sanction.

It was the general opinion of the Court, that the warrant, even in the circumstances which had occurred here, was competent, and therefore that the expence ought to be allowed. Lord Eskgrove mentioned a similar case, where a merchant in America (a native of this country) was apprehended on a *meditatio fugæ* warrant, when he was about to return to America in the prosecution of his business.

For Cha. Maxwell, R. Hamilton, } Advocates. Alex. Walker, } Agents.  
Capt. Montgomery, W. Tait, } J. Anderson, W. S. }

Lord Swinton Ordinary.

Home Clerk.

Vol. II. No. 20.

MINI-

CASE.  
I.

## MINISTERS WIDOWS FUND.

I. Mrs. JEAN M'KENZIE, Widow of the Reverend Mr. NORMAN MORRISON, Minister at Uig,

A G A I N S T

Mr. WILLIAM MORRISON Writer in Edinburgh.

The ministers widows fund is not assignable.

**C A S E**

**I.**

NORMAN MORRISON minister of Uig was twice married; he entered into his second marriage with the pursuer in the 1774, at which time he was upwards of 70 years of age. The defender William Morrison and his sister Ann Morrison were the only surviving children of the first marriage, and had their father died without leaving a widow, they would, in terms of the acts establishing the widows fund, have received upon their father's death a sum equal to ten years annuity, which, according to the rate that he had chosen, would have amounted to L. 250 Sterling.

In the 1776, Mr. Morrison had allowed his annual contribution to run greatly in arrears, and an agreement was entered into betwixt the pursuer and defender. It proceeds upon this narrative: That the annual contribution had been paid chiefly from the funds of Mr. Morrison's first wife; that had he not married again, the children of the first marriage would have drawn a sum equal to ten years annuity; that the defender had agreed to advance a considerable part of the arrears (L. 40.), and that in the event of the death of Mr. Morrison and his widow within a short time from that date, the defender might sustain a loss. Upon this narrative, Mrs. Morrison the pursuer, with consent of her husband, disposes and assigns, "to  
 " and in favour of the said William Morrison, for himself, and  
 " behoof of the said Ann Morrison his sister, equally among  
 " them, and his heirs and donators, the sum of 12 l. 10 s. Sterling, or the just and equal half of the foresaid sum of L. 25  
 " Sterling, or such other sum as she should be entitled to draw,  
 " in name of annuity or otherwise, from the foresaid scheme,  
 " or fund established by act of parliament, for a provision to  
 " the widows and children of the ministers of the church of  
 " Scotland, &c."

This

This deed was formally ratified in presence of a judge ; it was executed in August 1776, and Mr. Morrison died in the February following.

C A S E.

I.

The arrears due by Mr. Morrison at the time of his death, with the expences which had been incurred, amounted to 92 l. 9 s. 1 d. and consequently it required the whole annuity, down to Whitsunday 1781, to extinguish this arrear. From Whitsunday 1781, the annuity became payable to those having right to it ; and from that period the pursuer drew one half, and the defender the other.

It was not till the 1786 that the defender was repaid the money, which he had advanced to the collector of the widows fund ; and in the 1789 an action was raised for setting aside the assignation in his favour. The question came before the Court upon a petition and answers, in which the assignation was objected to on the footing of its being a *donatio inter virum et uxorem*, as well as on that arising from the nature of the funds. The Court, “ before answer, ordained the parties to give in memorials upon this point, How far the annuities of ministers widows may be assigned.” Feb. 18, 1791.

The ministers widows fund is regulated by the act 19 Geo. III. c. 20. The annuities which widows are entitled to draw from this fund are in the strictest sense alimentary, and every section of the statute shows that the legislature meant them to be personal and unalienable ; and this is consistent with the general and fixed law of the land, as appears from the concurring opinion of our lawyers, and the decisions of the Court. Argument for the widow, pursuer.

The Roman law protected alimentary rights against the deeds of the party in whose favour they were granted ; the rule was, *ne aliter alimentorum transactio rata esset quam auctore pretore facta*, Lib. 8. § *de transactionibus*.. See Voet, Lib. 2. tit. 15. § 14.

That alimentary rights, in the opinions of our lawyers, are unalienable and untransmissible, appears from Dirleton *voce aliment*, Sir Thomas Craig, Lib. 1. dieg. 15. § 7. Lord Stair, B. I. tit. 4. § 9. and B. III. tit. 1. § 37. Bankton, B. I. tit. 6. § 14. and B. III. tit. 1. § 19. Erskine, B. III. tit. 5. § 2.

The decisions of the Court are in conformity with these principles. Thus, Dict. Vol. II. p. 76. a bond for a certain sum, payable yearly to a wife for her aliment granted by a third party, does not fall under the *jus mariti*, neither will payment made to the husband, nor compensation upon debts due by him, afford a defence against the wife. Durie, 4th July 1637, Tenant v. Futhie. The like, Haddington, Nov. 1622, Edmonstone v. Kirkaldie. Nor is such a sum affectable by the husband's creditors. Durie, Spottiswood (husband and wife), 27th March 1627. Laird of West Nisbet v. Laird of Muriston.

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Muriston. Bruce, 16th December 1714, Spruill v. Duke of Douglas. Many similar questions are to be found in the same title.

The same principle directed the decision in the case of Dick of Grange v. Sir Andrew Dick, 22d December 1766. His Majesty had granted an alimentary sum to Sir Andrew Dick, his Lady and children, which was arrested, and the creditors pleaded, “ that although this donation were alimentary, and “ therefore had a privilege, yet it cannot defend against him, “ whose bonds were granted for furnishings to the family, “ which being alike privileged *privilegeatus contra privilegia- tum non utitur privilegio*. To which it was answered, that “ alimentary provisions not being affected with debts, is not “ by any privilege, but by the nature of the right, which “ being granted for the necessaries of life, can be applied to “ no other use but for the current provision, and not for the “ provision of anterior years.” The Lords found, that this donation of the king was merely alimentary, and that it was not affected with the husband’s *jus mariti* debts or escheat, nor with bonds granted by Sir Alexander for aliment of prior years.

Lord Kilkerran, in his decisions *vide* Aliment, notices the case of Urquhart v. Douglas of Glenbervey, where it was found that an alimentary provision, though made to a party and his assignees, could not be affected by creditors, in respect assignees were construed to be such only as might furnish the aliment; Urquhart v. Douglas, 15th December 1738.

But it has been urged by the defenders, that although an alimentary provision could not be attached by creditors, it might be assigned in the same manner that bills, though exempted from arrestment, might be effectually conveyed by the deed of the creditor. There is however no weight in this argument. Bills stand on a footing very different from alimentary rights; and although, in order to favour commerce, they are not attachable by arrestment, they are yet the subject of transactions, whilst alimentary rights are put *extra commercium*; and being destined for a particular purpose, cannot be diverted from that purpose, either by voluntary alienation or legal diligence. Bankton, in the Sect. formerly quoted, and Erskine, B. III. tit. 6. § 7. It is from the nature of the right that alimentary provisions are protected from diligence, and is upon the same principle that they have been found to be unalienable.

It is upon this principle that the annat cannot be affected by debts, or assigned to the prejudice of those for whom the law has intended it. “ A minister who had sisters, having “ assigned the annat to his brother’s son, the Lords found it “ belonged to the nearest in kin *proprio jure*, and not to the

af-

" assignees. Fountainhall Marcus (ministers), 18th March  
 " 1686, Alexander v. Cunningham. The annat is a legal  
 " gratuity in favour of the wife, children, or nearest of kin,  
 " that cannot be burdened with the defunct minister's debts,  
 " not being in *bonis defuncti*. Fountainhall, 20th February  
 " 1694, Donaldson v. Brown.

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I.

The defender shall consider, I. What assignments are. A rgument for  
 II. What is the extent and effect of assignment. III. Whether the assignee, de-  
 alimentary rights may be assigned. IV. Whether the annuities fender.  
 to ministers widows may be lawfully conveyed to assign-  
 nees.

I. Point. It is essential to the idea of property, that every  
 person may dispose of his own in whatever way he pleases,  
 unless restrained by positive enactment or express condition;  
 and as disposition is the mode of conveying heritable subjects,  
 it is by assignment that moveable rights are transferred. Stair,  
 p. 380.

II. Point. Assignations extend not only to all moveable rights,  
 but to personal heritable rights, and even to the profits of  
 liferents completed by saline, Huntly v. Home, 13th Decem-  
 ber 1628; and they are effectual with respect to all rights not  
 in their nature incommunicable, Stair, p. 385.

III. Point. It has been said, on the other side, that alimen-  
 tary deeds form an exception to the general rule that all  
 personal rights may be assigned, and they have resorted to the  
 title in the Roman law *de transactionibus*, in aid of their plea.  
 The text to which they have referred, in order to be understood,  
 ought to be taken along with its preamble, which is in these  
 words: " Cum hi quibus alimenta relicta erant, facile transi-  
 " gerent, contenti modico præsenti, Divus Marcus oratione in  
 " senatu recitata effecit, ne aliter, &c." Thus it appears  
 that the object of the law, was to prevent an abuse to which  
 the luxury and extravagance of the Romans at that period,  
 had given rise. But that law does not prohibit all transactions  
 in relation to alimentary provisions; it is against those only to  
 which the authority of the Prætor was not interposed that  
 the law was directed; and there cannot be a doubt, that the  
 Prætor would, *ex equitate*, authorise such transactions as were  
 founded on onerous and necessary causes. Besides, this law  
 refers only to such alimentary provisions as were left by testa-  
 ment, and does not extend to those arising from contract, or  
 for which a just price had been given, as appears from Voet,  
 tom. 1. p. 183, as quoted by the pursuer; and it is still far-  
 ther to be observed, that the restriction when it did take place,  
 was founded on an express enactment, whereas we have no  
 such law.

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## C A S E

L.

Recourse has been had to the opinions of our writers upon the law; and Lord Bankton is quoted as saying, that rights made entirely personal to the creditor as aliments, are unassignable. If, by this expression, it is meant that the alimentary right is declared in the conveyance itself, to be unassignable by creditors, (which is the only way of rendering it entirely personal), the defender will admit that the right cannot be assigned. But if it is meant that alimentary annuities, be their extent what it will, and whether they are gratuitous, or purchased at an adequate price, are all unassignable, the defender must be allowed to controvert the proposition.

An aliment is assignable, unless when it is otherwise expressly provided. Suppose that from the liberality of the Sovereign, or from some other source, an annuity of L. 200 *per annum* is settled upon a person who has no other means of subsistence, but without being declared unassignable; there is nothing to bar the annuitant to assign a part of the provision upon just and reasonable grounds. If induced by a sense of duty to a creditor, or impelled by the ties of nature, he should convey part of this income, would he be allowed to reduce this conveyance? surely not; the answer would be, that as there was no express or legal prohibition, the deed could not be set aside.

That such would be the judgement of the law the defender is entitled to presume, from the decision in a case observed by Falconer, 28th February 1683. There an uncle granted a bond to a nephew for a sum payable to him, but secluding assignees; notwithstanding this seclusion, the creditor granted an assignation to the Bishop of Brechin, who had married his mother, and took charge of his maintenance and education: "The Lords found, that clauses of that nature did not bind up the parties from assigning for onerous and necessary causes, and therefore sustained the assignation." If therefore an assignation for onerous causes be effectual, where assignees are expressly excluded, much more will it be effectual where there is no such seclusion.

What has been stated relates to gratuitous aliments, and where the assignation may be presumed a transgression in some respect of the will of the donor. But it makes an essential difference where the annuity is purchased at an adequate price. Suppose a person to apply his whole patrimony in the purchase of an annuity, it will, properly speaking, be an alimentary one; but it will not be pretended that the purchaser is not at liberty to assign part of it even gratuitously.

The present case resembles that one which has been just now supposed. The lowest rate, or that annuity which, by law, a minister is forced to provide for his widow, is only L. 10, which is 2 l. 10 s. less than this pursuer has been drawing; there-

therefore, whatever further annuity the clergyman may have purchased was in his own power, and he might have disposed of it; and the pursuer, who came in right of it, from motives of justice and expediency, did, in concert with the purchaser, convey part of that surplus by the deed under reduction.

Mr. Erskine seems to have followed Lord Bankton in this point without any other authority; and the defender hopes he has shown, that there is no foundation either in law or in the practice of the Court for the opinion.

IV. Point. Having said so much upon the general question respecting the assignation of alimentary funds, the defender shall explain the particular situation of the annuities provided for the ministers widows.

The statute, by which this fund was established, shows, that the children, as well as the widow of clergymen, were the objects which this establishment had in view. But the principal clause upon which this question turns is the following one, which was not only in the original act, but, at the distance of forty-six years, was *verbatim* engrossed in the late act: “ And  
“ be it further enacted, by authority foresaid, that the foresaid  
“ annuities payable to widows, and the provisions payable to  
“ children of the foresaid ministers, &c. shall not be liable to  
“ any arrestment, but shall be paid to the widows and chil-  
“ dren themselves, or to their tutors and curators, or trust-  
“ ees as afore said, or to their executors, and administrators  
“ or assigns, any law or usage to the contrary notwithstanding.”

These annuities are declared not arrestable, which would not have been necessary had the common law been considered as sufficient to preserve them from arrestment. But, with regard to assignation, they are not only not declared unassignable, but it is expressly provided that they shall go to assigns, which is the same with assignees.

The defender therefore apprehends, that he has established, that the annuity in question is not only alienable upon the principles of common law, but also by the express terms of the statute establishing this fund.

Lord Justice Clerk.—Every minister of the established church is bound to accede to the scheme of the widows fund; he may chuse his class: this man made his election, and his widow is consequently entitled to the highest class. The first wife died; and when a clergyman leaves children and no widow, the children are entitled to a certain provision: But he married a second wife; and if previous to the marriage he had entered into an agreement with the woman he was to marry, by which she had agreed to give up part of her provision to the chil-

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children, there might perhaps have been room for a claim on the part of the children for rendering the agreement effectual. But here the marriage took place without any such agreement; and in consequence of this marriage she has by law a right to a certain aliment; and as from the moment that the right is vested in her person it becomes alimentary, she is not entitled to enter into any transaction for the purpose of transferring it to another. The law has been anxious to guard against the influence of the husband; and the great object of the institution is to preserve the widows from being left destitute.

Lord *Eskgrove*.—I concur in the opinion which has been delivered by the Lord Justice Clerk. This act is a most salutary one; the object of it is to prevent widows from being left destitute. The provision in the act, by which it is declared that the funds shall not be arrestable, affects this question very greatly, for much might be said in favour of the creditors of the widow, and in support of their diligence; and if we see the law so anxious to guard these funds in a case so favourable for the creditor, much more ought it to be considered as striking against such transactions as the present, which may be supposed to have originated in the influence of the husband. If the husband be anxious to preserve provisions for his children, he may do so by refraining from a second marriage; but if he cannot restrain himself, he is not to purchase the gratification at the expence of the wife; she may be influenced before as well as after marriage: And if a transaction, entered into at that period, would be unlawful, much more must it be so when entered into at a posterior period. The expression in the act, which gives the annuity to the executors, applies to what is due at the widow's death, that of assigns to the arrears.

Lord *Swinton*.—There is no foundation for any distinction betwixt a transaction before and after the marriage; the fund is alimentary in both cases, and the provision of the statute is not to be got over.

Lord *Justice Clerk*.—The act is perfectly consistent; in one place the fund is said not to be affectable by arrestment; in another it is given to heirs, executors, or assigns: this latter part applies to the arrears.

Lord *President*.—I had some difficulty before, but it is now removed, and I am clearly of the opinion which has been delivered by your Lordships, that to give force to this transaction would be to destroy the beneficial effects of this statute; nor can there, in my opinion, be any difference whether the transaction take place before or after the marriage. There is a distinction laid down in *Urquhart's case*, reported by *Kilkeran* (aliment, No. I.), which ought to be attended to: it was there



## N U I S A N C E.

**I. PATRICK MILLER, Esq; of Dalwinton, Complainer,**

A G A I N S T

**ANDREW STEIN, Distiller at Burnhead, Respondent.**

A new manufacture being established, which had the effect of rendering a running stream unfit for the use of man or beast, as well as of destroying a gentleman's pleasure-ground, by the stench which was emitted from the stream, an interdict was allowed, until the cause could be brought fully before the Court.

### C A S E

I.

PATRICK MILLER, Esq; nearly twenty years ago, purchased the lands of Southfield, consisting of about twenty acres, and laid out a considerable sum in making additions to the house, and building offices. Through these lands there runs a small stream, which supplies the fields with water for the cattle that pasture there, and the water, which is sweet and pure, has been made use of for all the purposes of the family. Mr. Miller also dressed the banks of this rivulet at a considerable expence, by planting trees and shrubs, and forming walks amongst them; which, as the water runs through a hollow tract or den, rise gradually on each side, and form a delightful piece of pleasure ground. He had likewise built a cold bath in that spot which is supplied with water from the rivulet.

A brewery in the neighbourhood, which had lain for some time unoccupied, has been lately repaired, and converted into a distillery by Stein; and from the time that the manufacture has been set on foot, according to Mr. Miller's state of the matter, the rivulet is rendered so black and putrid that the cattle will not taste it. The cold bath is covered with a dirty black scum, over which is raised above fifteen inches of brown froth, and the whole den sends forth a most nauseous and intolerable stench. The water having thus become unfit for use, the family have been obliged to carry that necessary article from the distance of about half a mile. On these grounds Mr. Miller presented a bill of suspension and interdict, which Lord Eskgrove Ordinary appointed to be answered: " And until the bill is advised, prohibited Andrew Stein, and all employed by him, from throwing or allowing to run into the burn within mentioned, the refuse or resi-

Oct. 6, 1791.

" duum

“dum of the stills, or other materials from their manufacture.” This bill and answers coming before Lord Henderland to be advised, his Lordship took the cause to report on informations.

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I. Mr. Miller has no title to complain, although the distillery were truly a nuisance; and, II. There is in fact nothing flows from the distillery which can be considered as a nuisance.

Argument for Stein, the respondent.

The principle upon which it is said that Mr. Miller has no right to complain of the work, were it really a nuisance, is this: Mr. Miller came to the nuisance, not the nuisance to him. This is a distinction observed in every case of nuisance, even within burgh, where greater sacrifices are required from the individual in the exercise of his property than appears necessary in rural situations. Thus, in a question between the inhabitants of New-street and M'Coul a soapboiler, it was found that M'Coul could not be removed, because he had carried on his work previous to the streets being inhabited: In like manner, in a similar case which occurred between the inhabitants of Soho Square and Glossop a candlemaker, Lord Mansfield found that Glossop could not be removed.

The complainer has not disputed the general principle; but he alledges, 1. That he never heard that spirits were distilled at Burnhead during twenty years he has resided at Southfield. 2. That fifteen or twenty years ago the twentieth part of the stuff was not manufactured which the modern distilleries have done.

But, in answer to the first of these allegations, the respondent is ready to prove, that the subjects which he possesses have been for about sixty years past known as a brewery or distillery, or both, while it is not above twenty-six years since the place belonged to Mr. Miller was built, and a much shorter time since the bath was formed and the pleasure ground laid out. And although for some years previous to the complainer's entry there was no business carried on, the place being unpossessed, it can have no effect on the question, as his averment is, that there was a distillery on the subject which he possesses, long previous to Mr. Miller's house being built or the pleasure ground laid out; and that he is doing nothing but what his predecessors have done, and Mr. Miller suffering nothing but what his predecessors have suffered time out of mind; and there was produced extracts from the collection book of an excise-officer to prove, that, from the 1752 till the 1761, the subjects were possessed both as a brewery and a distillery.

As to the second alledgeance, it is equally unfounded; for Cleghorn, in the 1752, besides the brewery, used a still containing

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taining upwards of 130 gallons, whilst that now used by Stein, who has no brewery, does not exceed 116.

But allowing that Mr. Miller has a right to object to the operations of the respondent, he contends that there is nothing flowing from his distillery into the rivulet, which ought to give foundation for a complaint.

The respondent then gave an account of his operations, to show that there was nothing in what issued from his work that could injure an inferior heritor: And he argued, that although it might at times render the stream less pleasant to the eye, that was not a consideration which can be put into competition with the consequences of stopping the manufacture.

The streams of water have been of the greatest service to the manufacturers of this country: But all these advantages must be at an end if Mr. Miller's argument be well founded. If a distillery is to be removed, so must a brewery, a dye-house, a walk-mill, in short every manufacture, for there is none without some refuse; must be given up.

The complainer has said, that the water in the burn has been used for family purposes, and that they had no other supply: but this must be a mistake; there is a cistern, containing from 700 to 1000 gallons, to which the water is brought in a pipe from a spring in the neighbourhood, which affords a plentiful supply. And although it has been said that the cattle would not use the burn, it is a certain fact that they would have preferred to drink out of it below rather than above the distillery.

On these grounds the respondent prayed to have the bill refused; or if the Court thought a proper investigation necessary, that they might at least take off the interdict, as it was a daily loss to him, in duty to government, of upwards of twenty shillings, which was payable whether the work went on or not.

Argument for  
Mr. Miller, the  
complainer.

The respondent, in his papers in the bill-chamber, maintained, I. That the refuse of his distillery is neither noxious nor nauseous. II. That standing in the place of superior heritor, he has a right to make use of the burn for every lawful purpose; that a distillery is a lawful purpose, and besides, is entitled to encouragement. And, III. That that the distillery having been erected long before Mr. Miller's dwelling-house, the nuisance did not come to him, but he to the nuisance, and therefore that he can have no right to complain.

With regard to the first of these, that is, whether the refuse of the manufactory be hurtful or not, it is a matter of fact to be enquired into, and Mr. Miller does assert that it is highly so.

In support of the second proposition it was said, that when a proprietor does not use his property employously, the law will  
sup-

port him in the necessary and lawful use of it. That the law does not consider even a consequential damage, far less an inconvenience. Thus a man may build a house, on the extremity of his property, though it should hurt the light of his neighbour's house, or he may drain his ground although the water run down on the inferior tenement; and in the case of *Frazer v. Dewar of Vogrie*, it was found that a person might build a draw-kiln on the edge of his property, tho' his neighbour's house was thereby involved in perpetual smoke. But the present case is of a different nature; and Stein, in his argument, cautiously overlooks the distinction between the uses a man may lawfully make of his own exclusive property, and the uses to which he is entitled to apply what does not belong to him alone, but is his in common with others.

The complainer then proceeds to lay down the rights of a proprietor to a perrennial stream in the same way, and supports it by the same authorities that are used by Ruffel in his question with Haig (No. II. of this title.)

With regard to the last proposition, the complainer has no occasion to dispute the principle, but he denies that it is applicable to this case: he has been twenty years in possession of Southfield, but during this period he never heard that any spirits were distilled at Burnhead, nor has the water, during all that time, ever been rendered unfit for domestic purposes, by the refuse of the breweries: it never was rendered unfit for use, until Stein's distillery was set a going, about seven or eight weeks before the date of the application.

The recalling the interdict was opposed on the footing, that the family at Southfield would be deprived of water as well as the grass fields rendered useless for pasture.

*Lord Monboddo.*—I am for continuing the interdict; there is very great room to dispute that the water is now proper for either man or beast; and it is one of the greatest nuisances which destroys water, the first gift of nature, I am for allowing a proof.

Opinions

*Lord Swinton.*—I am for continuing the interdict; this is a *novum opus*; the effect of it is intolerable, and therefore I am clearly for continuing the interdict.

*Lord Justice Clerk.*—The only question at present before the Court is with regard to the continuation of the interdict, and I am for continuing it. This is more than a nuisance, though, were it only to diminish the pleasure of walking in this gentleman's policy it would be right to continue the interdict. But when we see the inferior tenement deprived of that necessary article, pure water, there can be no hesitation. We have, after the Roman law, found, that an inferior tenement cannot be deprived of a spring; the heritor is bound to transmit it to

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the inferior tenement, *multo magis*, he cannot send it down in such a state as to be of no use. I am therefore for passing the bill, but continuing the interdict, on this plain principle, that the proprietor is entitled to the use of the water for cattle. It is true you thus decide the question to a certain extent. But the loss, if this interdict proceeds on a wrong allegation, can be made up to Stein. But were you not to continue the interdict you deprive the heritor of a necessary article.

Lord *President*.—I agree in the opinions which have been delivered, a pure stream cannot be polluted by a *novum opus*.

Lord *Essex* was of the same opinion.

Judgement.  
Nov. 1791.

The Lords pass the bill, and continue the interdict \*.

|                                  |              |                 |           |
|----------------------------------|--------------|-----------------|-----------|
| For the complainer, Alex. Wight, | } Advocates. | A. Keith, C. S. | } Agents. |
| Respondent, John Patison,        |              | J Bogue, C.S.   |           |
| Lord Henderland Reporter.        |              | Bill chamber.   |           |

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\* This question was afterwards settled by arbitration.

## II. DAVID RUSSEL and Others, Pursuers,

A G A I N S T

JOHN HAIG, Defender.

A distillery in the neighbourhood of a city, which has the effect of rendering more polluted a stream, arising partly from common sewars, and partly from certain springs and ditches in the neighbourhood, is a public nuisance.

## C A S E

II.

THE burn of Lochrin is a small run of water, of about two miles in length from its rise in the Meadows or Hope-park to its junction with the Water of Leith. The ditches of the meadows receive into them the common sewars, the kennels, or water-runs of George's Square, Bristow-street, Buccleugh-place, and indeed of almost the whole south side of Edinburgh. The burn of Lochrin, which is the outlet, receives into it, in its course, the dirty water and filth of the Wrights-houses, Ponton-street, Cowfeeder-row, and Fountainbridge. These fall into it before it has run one-fourth of its course. There are likewise several springs which run into this stream, and the most considerable of them join it a little way from its junction with the Water of Leith.

John

John Haig erected, some years ago, a considerable distillery on the edge of this run of water, and a very short way from its source. This situation had originally been occupied as a brewery, but from the 1772 had been employed as a distillery on a smaller scale. Mr. Ruffel, and some others, who are proprietors of the grounds where this run joins the Water of Leith, finding the water, after the erection of Haig's distillery, rendered unfit for domestic purposes, or even for the use of cattle, brought an action against him for preventing him from poisoning and polluting the stream.

In this process a proof was allowed, when it appeared, in addition to the circumstances that have been mentioned, 1. That this run of water, for at least half a mile from its origin, was, prior to the erection of the distillery, an offensive polluted stream, though not so nauseous as to prevent cattle from using it. 2. That farther down, and where it passed through the possessions of the pursuers, it became pure and fit for cattle, and for family purposes. 3. That after the distillery was set agoing, there was warm water discharged from it, which preserved its heat for a considerable way: That this water was greatly discoloured, and of a very offensive smell that cattle would not use it: that the smell and nauseousness is perceptible, not only through the whole course of the burn, but even in the Water of Leith, for a considerable way below the mouth of the burn. 4. That the discharge from the distillery consisted of warm water, burnt ale, and draff.

This question came before the Court, first on the state: and counsel being heard, an interdict was pronounced. This judgement was brought under review of their Lordships, upon a petition and answers. The following argument was maintained by the parties.

The judgement in this cause tends to establish two very important questions in point of precedent. 1. That it is not lawful to convey water, whether pure or not, into a burn which serves as the receptacle of the filth of a great city. 2. That the dregs, refuse, and materials attending the manufacture of distillation are not to be thrown into such a burn, though every species of filth from the suburbs of a town may be lawfully emptied into it. Argument for Haig.

The first of these opinions seems to be founded on this circumstance, that the addition of a stream of water tended to protrude the filth of Lochrin, and to carry it forward in the channel, further than it would otherways have gone; so that it was prevented from stagnating and putrifying in the neighbourhood of the place where it was thrown in, and was carried forward, so as to distress the pursuers, whose property lay at

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such a distance, that without the addition of water, a filtration only from the putrid mass would have reached them.

With respect to the second opinion; the principles on which it is founded are not so perceptible, as it was not said that there was any thing peculiarly noisome in the refuse thrown from a distillery; and surely it cannot be more pernicious than the contents of a common sewer. It does not appear therefore that there is any principle in this part of the interlocutor which does not go equally to interdict a washerwoman, a dyer, a brewer, or even a private family, from throwing excrementitious matter into a common sewer.

It cannot be questioned that the inhabitants of that quarter of the city have an established right in Lochrin, for carrying off the filth and sordes of all kinds from their habitations and streets adjoining. Now, as it is established, that beyond the period of the proof there was a brewery on the stance of the distillery in question; and since the 1772, a distillery, which down to the 1787, made use of Lochrin for carrying off the washings of their looms and other sordes without interruption; the defender cannot conceive upon what principle he has been interdicted from continuing as formerly, to emit the ordinary sordes of the manufactory, in common with those of other manufacturers, and those of the ordinary inhabitants of that quarter. It surely will not travel further, nor be more offensive, than those of a common street gutter.

It is true every additional street, every additional building, will encrease the mass at Lochrin, and make it travel farther: but if it be impossible, on this ground, to stop the increase of buildings; it must be equally impossible to stop the growth of manufactures, and *a fortiori* to remove an old manufactory.

It is said manufactories are not *necessitatis sed voluntatis*: But they must exist somewhere, and no place seems fitter for their site, than a burn become a common sink by prescription.

As therefore a distinction has been made between the ordinary sordes of the distillery and the great quantity of water which is let off from it, there is no principle for justifying the interdict with respect to the former of these, and it is only with regard to the latter that there seems to be room for argument on either side, and as this is a point of general consequence, it shall be brought fully under consideration.

In the first place, the defenders apprehend it to be a clear proposition, that the right of using Lochrin as a common sewer is secured beyond controversy by immemorial usage. In the second place, they take it to be equally clear that a right to a common sewer implies a right to clean that common sewer; and accordingly it is in proof, that that right has in this case been exercised by the inhabitants of George's Square. But the effect of this operation is to bring the contents

tents of the common sewer forward on the inferior heritor; and if the principles be just, which the pursuers have taken up, they must be entitled to an interdict against any such operation; and hence it follows, that every great city which has not procured the privilege of venting their common sewars into the sea, or into some public river, may be poisoned by retaining them within itself. If these consequences follow fairly from the principles of the pursuers, it must be allowed that they afford an invincible argument *ad absurdum*.

The defenders may ask whether the law of any country ever granted an interdict for scouring a common sewer by means of a stream of water, though the content might thereby be propelled more rapidly and to a greater distance. The defenders do not hesitate to peril their cause on the issue that there is no trace of such an interdict to be found in the laws of any civilized country. This use of water is the most effectual and the healthiest way of cleaning common sewars; and were it possible there could be nothing to prevent the inhabitants of George's Square to open a run of water into each of their common sewars: to interdict such a use of water, is to interdict the opening of a well, or the introducing a supply of fresh water, as they must of necessity encrease the run of water in the common sewars.

The water, which is the subject of the interdict claimed by the pursuer, is chiefly furnished from a large well, and raised by pumps wrought by a fire-engine; part of this water supplies the engine, and what remains is used in cooling the worms of the still: this, with what by the distillers is called clearie, being the residuum after the distillation is finished, and consisting entirely of water, is all that is allowed to enter the stream in question; for the draff and burnt ale is used for feeding cattle.

The question therefore is, whether the defenders can be considered as giving rise to a nuisance, by throwing a small stream of fresh water into a burn subjected from time immemorial to serve the purposes of a common sewer.

If a loss be actually incurred by an inferior heritor from such operation, it is a loss which, although the distillery were destroyed, the encrease of the town must in a very few years bring upon him. It is impossible to interdict the erecting of houses, or to interdict the multiplication of mankind; and so long as it is lawful to inhabit the earth, and to multiply, the inhabitants of the superior tenement, must be entitled to erect houses, to form streets and common sewars, whatever the consequences of that may be to the inferior tenant. But these consequences do not produce a pecuniary loss.

May not the defenders then ask, why they should be interdicted from doing a thing which produces that inconveniency which

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which a nearer neighbour might have fully occasioned by building a suburb at Dalry. The defenders have not heard that the proprietors alongst the banks of the lead that serves the Cannonmills have endeavoured to obtain an interdict against the construction of the New Town of Edinburgh because the common sewars terminate in that lead. Then the principle of interdicting the defenders goes to interdict a proprietor from sending down filth two miles, when a proprietor within a quarter of a mile of the favoured spot could not be interdicted from sending it down that shorter space.

The defenders do with reverence admit the doctrines they heard delivered, that there is a scale of uses which entitles an inferior proprietor to stop the superior proprietor from the use of a stream, in consequence of its interfering with a more primary use competent to the inferior proprietor. If an inferior heritor had no access to water for family purposes but from one stream, he would be entitled to prevent a superior heritor from opening into it a level from a mine that imptied into it poisonous water. Or, in certain climates, where water is very scarce, a superior heritor might be compelled to very expensive operations to prevent a stream from being defiled; but in this country such restraints are unnecessary; and nothing could be more pernicious than to put an embargo on manufactures and cultivation, where *amanitas*, or even conveniency could be pleaded, for depriving proprietors of the full use of their property.

The common law was not held to have prohibited the steeping of lint in running water, and an act of Parliament was passed for the purpose; neither have inferior heritors been permitted to stop the opening of coal-works, or mines, or to remove bleachfields, though unquestionably the adjoining streams receive some degree of pollution. In short, where the rights of proprietors interfere, many circumstances must be taken into consideration before the Court will restrain the superior heritor in the use of his property. In general, his uses in a running stream form a natural servitude on the uses of the inferior heritors; and if this last shall set up a primary use to deprive the superior of a use lower in the scale, he must shew, not only that his primary use is destroyed, but that he cannot otherways be supplied.

The defenders shall add only one other observation, it is this. In Scotland, the advantages for manufactures seem to have been destined by nature to balance the disadvantages in point of cultivation from a foil and climate not favourable. The unequal form of the country produces considerable falls in the inland districts, and our mines afford abundance of fuel and other minerals; but scarce any manufactory can be erected upon a running water, nor mines opened in any  
quarter

quarter excepting at the shore of the sea, without some degree of contamination being occasioned in running water. Were complaints founded on such circumstances to be admitted, a great restraint would be laid on the advancement of manufactures, and on the cultivation of the country, so intimately connected with them.

The defender has supposed the judgement of the Court to establish what he calls two important questions in point of precedent. This is however rather an improper observation; the judgement establishes no general proposition, being calculated only to do justice between the parties. It indeed proceeds on this principle, that no person, in carrying on a manufacture is entitled to convert it into a nuisance, by corrupting and rendering unfit for the use of man or beast a perennial rivulet; and the defenders will find it a difficult task to dispute the justice of this principle, founded not in municipal law alone, but in natural law and justice.

No person whose property lies on the banks of a perennial stream can appropriate that stream to himself; he has indeed a twofold right in it, the first is of a usufructuary nature, which entitles him to make use of it for all domestic purposes, and this, with great propriety, is said to be the primary use of water. The second is a right to apply it while it passes through his own ground, to artificial purposes, such as driving machinery; but these rights he enjoys under two conditions. 1. That he shall not cause the water, to regorge upon the ground of a superior heritor. 2. That he shall send it down to the inferior heritors in such a state as shall enable them to make every lawful use of it of which their situation will admit.

This was carried so far by the Roman law, that they did not even allow the superior heritor to divert the course of a water altho' the inferior heritor made use of it only for pleasure L. III. p. ff. *de aqua quotid. et ast.* And the same rule takes place in our law, Lord Stair B. II. tit. 7. § 12. *Hope de actionibus in factum*, Bairdie v. L. Stonehouse; Dict. Vol. III. p. 350. Kelso v. Boyds, July 1, 1768.

In short it is an established point, that an inferior heritor is equally entitled with a superior both to the primary and secondary use of water. Were this rule disregarded the most distressing consequences would ensue, many landholders having no water for family use, or for their cattle, but a stream running through their grounds. But if the superior heritor cannot deprive the inferior one of the use of his stream by diverting its course, neither can he do it by corrupting it so as to render it unfit for the primary uses of water.

During the course of the pleading, it was said that inferior heritors are frequently obliged to submit even to poisonous matter

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matter being introduced into a stream. The case was put of a superior's opening a lead mine, which might produce this effect, and though the argument is not pushed quite so far in the petition, still it is maintained that where the inferior heritor is plentifully supplied with streams of water he would not be allowed to object though one stream were thus polluted.

The pursuers cannot admit of the argument with this modification; on the contrary, they apprehend that it must be competent for an inferior heritor to object to every operation of the superior one that may tend to poison or corrupt any water that formerly run pure, although he may be otherways supplied with a sufficiency for his domestic purposes.

The pursuers next proceeded to show, that in point of fact, the stream running through their grounds had been so polluted by the operations of the defender, as to be rendered unfit for the primary uses of water.

With regard to the power of prohibiting the erecting of houses, it is admitted that property in the vicinity of a town derives an advantage from its situation, which counterbalances the inconveniencies of it. But although proprietors in the situation of the pursuers might have no power of stopping the increase of buildings, yet a manufacture is not entitled to the same favour, and it ought to be carried to a place, where it could be attended with no prejudice to the neighbourhood.

Nor will it avail the defender to say, that the fordes of a distillery are not more pernicious, more disagreeable, nor more fluid than the common fordes of streets, &c. It is sufficient for the pursuers to have proved that they suffered no inconvenience from the latter, either before the distillery was erected or whilst it was at rest by the failure of Haig, as it shows that it is from this manufacture that the evil they complain of has arisen. If therefore the defenders cannot carry it on in that quarter without creating so insufferable a nuisance, they must give it up and prosecute their business elsewhere.

It is equally unnecessary to give an account of what is thrown into the burn from their work; for from that alone a stream, which formerly was pure, is now rendered unfit for man or beast.

Whatever title the manufactures of this country may have to protection, it must be given with a due regard to the rights of individuals. The advantages arising from the distillery of spirituous liquors is at least problematical; but in whatever light this manufacture may be viewed, the pursuers are entitled to maintain that they are not called on to forgo their natural rights, in order that it may be carried on with more advantage in their neighbourhood. Many manufactures, though of a necessary kind, are considered as public nuisances, and as such cannot be carried on in the heart of towns, nor when they are de-

de-

destructive to the health, or even to the comfort of the neighbourhood. Of these many instances have occurred in the decisions of the Court.

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Lord Swinton.—The first position of law is *neminem ledere*; there is great lesion from this distillery: some nuisances are necessary, and these must be allowed: Manufacturies are no doubt useful, but they should go where they will not be hurtful. Distilleries should go to the mouths of rivers, or to the sea shores. There is no help for it if George's Square should be built down to Mr. Ruffel's very door: They have an indictment for bad smells in England; they indict for boiling bulls-blood (read such an indictment). As to the destroying of the water, water may be got elsewhere, but when the air is tainted, it cannot be purified.

Opinions.

Lord Hailes.—What moves me was the neglect to bring this complaint sooner.

Lord Monboddo.—The use of water is necessary. The primary use is not for carrying off impurities, but for drinking; and it is here of consequence, that not only was the water tainted, but the air also. The taste of men is said to be various, and no doubt it is so, but that of horses is unvitiated. It is proved here that at least one horse refused to drink the water. It was not poisonous, according to the opinion of Drs. Robertson and Black; but dangerous and unfit for all the common purposes of life. As to the law, they have no title to carry on this distillery attended with such effects.

Lord Dregburn.—It is of consequence to prevent their throwing their refuse into the burn. It is said to be impossible; but in one of their papers they say they were to erect a reservoir: I doubt whether a person can open a lead mine, and send down the poisonous water; and I think this has been improperly admitted by Mr. Wight. Amongst the Romans, it was unlawful to narrow a channel, so as to impede the velocity of the current. I do not see the difference betwixt diverting the course of a stream, and altogether destroying the use of it to the inferior proprietor. I am a little moved by the acquiescence here; but if it is to go on, they must throw their refuse elsewhere.

Lord Rockville.—This question involves the right of establishing manufactures on smaller streams. This work is a great nuisance, but it is unjust to stop the work now; and to order them to put their refuse into pits would be much worse for the community. The stream was impure before the erection of the distillery; the drains from George's Square, Cowfeeder-row, &c. are the sources of it.

Lord Justice Clerk.—I think that a proprietor is entitled to every

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every use to which water may be applied, where there is enough for all purposes; but if he cannot have all the uses of it without hurting others, there is a certain order of uses: the natural and primary uses, are preferable to all others; these are drink for man and beast. If, by this distillery, the water is destroyed and unfitted for use, the manufactory must yield and the inferior proprietor must have the natural and primary uses of the water. As to the case of lead mines the question can never occur; for these are to be found in bleak uninhabited parts of the country, in places where there are few inhabitants, and plenty of water; but were they to be discovered where there was not water for other purposes, the proprietor of the lead mine would not be allowed to poison the water. I think this work cannot go on unless they devise some method of preventing the water from being contaminated.

Lord *Eskgrove*.—There is evidence that before this distillery was erected, the nuisances from George's Square did not destroy the water below Fountainbridge, and if so, it is the same with respect to Mr. Russel as if there had been no nuisance whatever. If then there be impurity now, the question is, whence does it proceed? If by the distillery and its fire-engine, this impurity is increased and driven down to Mr. Russel, he has a right to complain; there is nothing in the acquiescence of others, if I never felt the impurity before, I have a right to complain when I first feel it. As to the extension of George's Square, or other parts of the town, we shall judge of that question when it happens, this distillery forwards the impurity; a necessary is not in itself a nuisance, but if it communicates with a running stream, which is used for drink, it becomes a nuisance; or if it increase the impurity, and makes it extend farther, so as to render impure what was pure before, it is a nuisance. The acquiescence in this case has little effect with me; the grievance was inconsiderable in Reid's time, but now there is a fire-engine; whether the refuse of the distillery can be carried elsewhere, I know not, but these gentlemen must be freed from distress.

Lord *President*.—I have no great favour for distilleries: They are manufactures no doubt, and manufactures in a commercial country are to be favoured; but they are manufactures of the most unfavourable kind. I have, however, difficulties in the circumstances of this case, though the law is clear as stated by Lord Justice Clerk. Blackstone's authority is to be respected; we must not poison streams. In Wardrope's case, Lord Mansfield thought it sufficient that the nuisance rendered life uncomfortable, it was not necessary that the water should be poisoned. Had this distillery been erected on a clear limpid stream, it could not have stood with the consequences which attend

attend it; but here there is nothing but a filthy burn, most polluted and unfit for man or beast; after connection with the other streams, it is not quite so polluted: this was the state of it before the distillery; it is noxious above the distillery; the only effect then of the distillery is to throw more water into the stream, and so to force down the pollution from George's Square, the meadows, &c. which formerly stuck by the way; the water of the lower proprietors, which was formerly bad, is thus rendered more polluted. This involves a nice question, whether throwing quantities of water into a common sewer, so as to carry down the filth farther than it otherways would have reached, be a nuisance that can be stopped.

“ The Lords, on the hearing, found that the defenders are not  
“ entitled to convey the water from their fire-engine and dis-  
“ tillery, or to throw the dregs, refuse, or materials of their  
“ manufacture into the burn called Lochrin or Crossburn;  
“ and discharged and interdicted them from so doing in all  
“ time coming, and decerned, &c.”

Judgement.  
June 10. 1791.

The petition against this judgement was appointed to be answered; and, on advising the petition and answers, the following opinions were delivered.

*Lord Rockville.*—This is a very different case from the last \*. Supposing that there was no distillery here, this run, from George's Square and the ditches of the meadows would be noxious: Therefore, it is a more difficult case from the particular nature of the stream. The throwing of pure warm water into this stream would have no more effect than a flood has. It is the duty of the Court to protect manufactures; and there my doubt lies.

Opinions.

*Lord Dreghorn.*—Building private houses is a primary use, distillery is not so, and there lies my doubt; but I rather incline to the opinion of the interlocutor, as it appears to me that what issues from the distillery does harm, and renders the water worse than it is above the distillery.

*Swinton.*—I am of opinion with the interlocutor, on the same ground with Lord Dreghorn; since there are evils, we should admit those only which are necessary: dwelling houses cannot be avoided, but manufactures may; and they ought undoubtedly to be carried to the sea-side, or to rivers where they could do no harm. This burn appears to have been tolerable before the distillery was erected; but since that work has been set a-going, it has become intolerable. Even the smell is of consequence; water may be got from pits where

\* This question stood in the same roll, and was decided the same day, with the question betwixt Miller and Stein, No. 1. of this title.

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the stream is itself polluted ; but air, when it is tainted, cannot be rendered pure.

Lord *Monboddo*.—Of the opinion given. His Lordship drew a comparison betwixt the process by which wine is made, and the manufacture of spirits ; he reprobated the manufacture of the latter as destructive to the health and morals of the people, and tending to depopulate the country. On these considerations, his Lordship thought the manufacture entitled to no favour. He said the filth of this manufacture is let into a stream polluted before, and on that account, the distillers maintain they have a right to do so. But this is no reason for supporting them in their operations.

Lord *Justice Clerk*.—If these gentlemen could have said “ the water was originally unfit for man or beast, why then prevent me from using it when I do it no harm,” I should have thought the plea good ; but the proof rebels against this. Before the distillery was set a-going, and even during the time that it was stopped, the water of this stream was used for man and beast. But now since the works are begun again, no person can bear the smell of the water, it is so offensive.

Lord *Esqgrove*.—Had this water been formerly unfit for the use of man and beast, the distillery could not have been removed ; in that I agree with Lord Justice Clerk. I would go further ; for I think the inferior proprietors might have opposed the gentlemen of George’s Square, and might have prevented them from polluting the ditches and streams ; but it would be an odd law, that because an heritor had submitted to a servitude of receiving filth from one tenement, he was bound to receive it from every other. Suppose, for instance, a superior heritor should emit further nuisances, would that prevent inferior heritors from objecting ; I have no notion of that : In Mr. Ruffel’s ground this burn was formerly of some use, now it is of none. I shall not compare this manufacture with any other, it is not prohibited by law and therefore I have no right to suppress it.

Lord *President*.—I confess that I have no favour for distilleries and therefore should not be sorry, were the Court to put an end to this one. But I have difficulties in this case : when this distillery was first set down, the stream was a polluted one ; but farther down than where the distillery stands, this polluted burn was joined by a stream of pure water, which rendered it at Mr. Ruffel’s tolerable. Above the joining, however, it always has been in its present state (read the deposition of the gardener who could not use it even to water the plants in his garden). I have therefore a perfect conviction that the distillery did no harm : originally the filth was deposited at Lochrin, and before the junction with the clear stream ; therefore

fore the only effect which the distillery produced was to carry forward the filth: a coal-engine must have produced precisely the same effect, and the question is, whether this is a nuisance. Were it a pure stream, I should consider it in the same light with the former case (Miller v. Stein); but I doubt whether the Court can declare that to be a nuisance which only carries filth farther down a stream.

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The Lords refused the petition and adhered.

Judgement.  
Nov. 1791.

|                                |              |                 |           |
|--------------------------------|--------------|-----------------|-----------|
| For the Pursuers, Alex. Wight, | } Advocates. | Ar. Crawford,   | } Agents. |
| Defender, Allan M'Conochie,    |              | J. Taylor, C.S. |           |
| Lord Justice Clerk Ordinary.   |              | Sinclair Clerk. |           |

Vol. VIII. No. 2.

P A C T U M I L L I C I T U M.

I. The Trustee for the Creditors of JOHN NISBET, late Merchant in Eymouth;

A G A I N S T

ALEXANDER ROBERTSON in Prenderguist.

An heritable bond granted in security of the price of smuggled goods, to a foreign merchant who had been accessory to the smuggle, and conveyed to a person in this country, was found to be reducible.

RICHARD PILLANS, a native of Holland, and merchant in Rotterdam, had been engaged in furnishing goods to John Nisbet merchant in Eymouth, which he knew were to be smuggled into this country; and it appears from his letters, that he had pointed out to Nisbet different methods of conducting this business, as well as solicited employment in that line. Thus, in one of his letters, he says, "Our India sales are now over, and on the other side you have the quotations of the present shipping prices for your government; if you wanted to make another trial this winter, here is one of our schoots on sale, &c." This trial was not made, but a commission was given by Nisbet, which was answered by Pillans. Pillans writes as follows, upon this occasion: "In my last I acknowledged

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“ ledged the receipt of your favour by the Royal Code, and  
 “ have dispatched the cargo, as *per* invoice on the other side, of  
 “ 2996 st. to your debite, and hope it will meet better luck.  
 “ I expect it on board this day, and as the wind is fair, may  
 “ be with you ere this comes to hand.”

In further confirmation of the agency of Pillans, in these smuggling transactions, there was a letter founded on, written to Robertson the defender, in which Pillans says, “ Thomas  
 “ Anderson of Perth, recommended to us Mr. John Nisbet of  
 “ your place, with whom since the dissolution of our partner-  
 “ ship I have done business, and I believe to his satisfaction,  
 “ as far as respected the management here.”

It was the cargo sent by the Royal Code, and which was taken, that gave rise to the claim against Nisbet. For this debt (which in the 1778 amounted to L. 413 Sterling), Nisbet after a long correspondence with Pillans, granted an heritable bond, over the lands of Gunsgreen. This bond was taken in the name of the defender Alexander Robertson, who had acted as the friend and correspondent of the foreign merchant, and was afterwards purchased by Robertson in the 1782, at the price of L. 400, although it then amounted, with interest to L. 600. When this transaction was settled, Robertson the defender received from Pillans, the foreign merchant, a formal assignment of his right to the debt.

Nisbet having become bankrupt, his estate was sequestrated in the 1787, and a reduction was brought, by the trustee for the creditors, of the heritable security standing in the person of Robertson.

Nov. 30, 1790. This reduction came before the Lord Justice Clerk as Ordinary, and his Lordship pronounced the following judgment: “ The Lord Ordinary having now and formerly heard  
 “ parties procurators at great length in this case, finds, from  
 “ the letters of correspondence, and whole circumstances of  
 “ the case, it appears, that Richard Pillans not only furnish-  
 “ ed to Nisbet, contraband goods, knowing that they were in-  
 “ tended to be imported into this country, but that he was al-  
 “ so accessory to, and active in the act of importation; and  
 “ that therefore the objection of a *pactum illicitum*, would be  
 “ a good objection against Pillans, if he was claiming pay-  
 “ ment: Finds that the objection is, in this case, a good objec-  
 “ tion against Mr. Robertson, in respect that every objection  
 “ that would be good against a cedent, would be good against  
 “ the most onerous assignee: And finds, that the infestment  
 “ proceeding upon the heritable bond will not vary the case,  
 “ in respect, that although an infestment upon a right in se-  
 “ curity may be a good bar to any personal exception that  
 “ may lie against the security, yet it does not bar personal ex-  
 “ ceptions against the debt secured; and therefore upon the  
 “ whole

"whole sustains the objections, and reduces, decerns and declares accordingly."

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This judgement was brought under review, upon these grounds: 1. That from the account produced, it appears, that part of the debt at least arose from advances in cash made by Richard Pillans to Nisbet. 2. That as to the rest of the debt, although it may be the price of smuggled goods, yet there is not sufficient evidence that Richard Pillans had an active hand in the illegal importation. 3. Supposing he had been concerned in the illegal importation; yet being a foreign merchant, and a foreigner by birth, the document of debt, although it had remained a mere personal obligation, could not have been set aside, even in a question with himself. 4. That however the question may stand with him, the ground of reduction cannot operate against an onerous assignee. And lastly, That there is no ground for a reduction on the head of a *turpe pactum*. The rule is, that in *turpe causa melior est conditio possidentis*; and the defender is not now claiming payment of a debt, but defending himself in the right; he has obtained over Nisbet's estate.

In answer to these, it was said, first, that what is called advance of money in the account, is money employed in repairing the ships that were engaged in the contraband trades, and for enabling them to carry on that trade. In answer to the second, the evidence arising from the letters already quoted, was referred to. Thirdly, It was argued that on the principles of the English decisions, as well as of those which latterly had been pronounced by the Court of Session, a foreign merchant, who, is either directly or indirectly, engaged in illicit trade, cannot derive any advantage from those laws, which he has violated, *Biggs v. Lawrence* \*. *McLure and McCre*

\* BIGGS v. LAWRENCE.

*An action cannot be maintained by several partners for goods sold by one of them living in Guernsey, and packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in England, knew nothing of the sale; for it is a contract by subjects of this country, made in contravention of the laws; and this case must be considered in the same light as if all the partners lived in England.*

*Where an agent is employed to buy goods, his acknowledgment of having received them is evidence of a delivery to the buyer.*

UPON a rule to show cause why there should not be a new trial, in a cause Nov. 18, 1789. tried before Buller, J.—at the last assizes in Cornwall; the learned judge reported, that this was an action for goods sold and delivered, brought by four partners, plaintiffs, three of whom lived in England, and the other in Guernsey. The defendant, who lived in Cornwall, sent an order for some brandy to the partner living in Guernsey, which he directed to be delivered to one Wood, the captain of a smuggling vessel. Some of it was delivered at Guernsey, other part of it at sea.

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**McCrea v. Paterfon.—Sibbald and Company v. Wallace.—Cantly v. Robertson.** Kaims's Illucidations p. 151. Upon the fourth head it was maintained, that there is nothing in the objection founded on a *pactum illicitum*, which can vary it from the situation of any other objection; and that the assignee here, as in every other case, must have been liable to the objection

sea. It was all put by the partner at Guernsey into half ankers, and ready slung for the purpose of smuggling: But it was to be brought into England at the risk of the defendant. The contract was made, and the goods delivered, without the privity or personal participation of the three partners residing in England. Two objections were made at the trial by the defendant's counsel; 1<sup>st</sup>, That Wood's hand-writing, acknowledging the receipt of the goods, was not sufficient to charge the defendant, but that Wood himself ought to have been called. But as it was established that Wood was the defendant's agent for this purpose, the goods being directed to be delivered to him, Mr. Justice Buller thought that any acknowledgment under his hand was evidence against his principal, as much as if it had been an acknowledgment in the hand-writing of the defendant himself. 2<sup>dly</sup>, It was objected, that the plaintiffs could not recover, because it appeared by their own showing, that the goods were intended to be smuggled into to England, of the laws of which, they, as subjects of the crown of Great Britain, were bound to take notice, and that one of them had actually assisted in the very act of smuggling. And the learned judge being of that opinion, nonsuited the plaintiff.

*Laurence*, Serjeant, against the rule, was stopped by the Court.

*Gibb's*, *contra*, admitted that the question must be considered as if all the plaintiffs lived in England; but contended that they were entitled to recover the value of the goods, because the contract of sale, and the delivery of the goods were completed at Guernsey, where such a contract was not illegal: And the goods being afterwards smuggled into England will not defeat the plaintiffs right, which accrued on the delivery of them, as they were not concerned in the subsequent act of smuggling, even though they knew at the time the defendant intended it. The case of *Holman against Johnson*\* expressly decides this point, which was fully discussed both at the bar and on the bench: And that case has been acted upon as a law ever since. Now that cannot be distinguished from the present case upon any of the principles upon which it was decided. In both, the contract was completed abroad, and the vender knew that the goods were to be smuggled into England †. But even supposing that a contract for the sale of goods was made in England, and the delivery of the goods here, there is no authority to show that the vender cannot recover the price, on account of any illegal use which the vendee may afterwards make of them; and yet numberless instances must have occurred wherein such a defence might have been set up in point of fact. If the sum which the vender was to receive depended on the subsequent illegal act, or if the vendee, by his contract, were obliged to make an illegal use of the goods, that might make a difference: But here the contract was completed before any illegal use was made of the goods. On the contrary, there are analogous cases, in which it has been held, that the original contract is not affected by the subsequent use made of the thing contracted for, if it be optional in the party to apply it afterwards to what purposes he pleases: As if one lend money to another to game with, although gaming be illegal; yet it hath been held, that such money may be recovered by the lender, although it be lent at the time and place of play, *Robinson v. Bland*. 2. Burr. 1077: For the statute *Anne*, c. 14. § 1. only annuls the *security*, and not the *contract*. So in the

\* *Cowp*, 341.

† It should seem from the manner in which the case of *Holman*, and another against *Johnson*, is reported, that one of the plaintiffs was a subject of this country, though resident at Dunkirk, for one of them is said to be *resident* at, and the other a *native* of Dunkirk: But no stress is laid on that circumstance.

tion, competent against the cedent; besides it was said that Robertson was acquainted with the whole transaction and therefore was not a *bona fide* assignee, and that he had in fact purchased the right at an undervalue. On the fifth point, the pursuer admitted, that had the defender recovered payment, action would not have lain for repetition; but he insisted

case of *Petrie v. Hanny* †, it was objected, that as the plaintiff knew of the illegality of the transaction, he ought not to recover; but the Court thought that it did not affect the contract, with respect to the rights of the party who advanced the money by the direction of the defendant. In no instances have objections of this sort prevailed, unless where the plaintiffs were themselves parties to the illegal act, which cannot be said to be the case here; for before the goods were attempted to be smuggled into England, the contract of sale was entirely completed.

Lord Kenyon, C. J.—If the decision of this case had the least tendency to overturn that of *Holman v. Johnson*, I should certainly pause a little before I give any opinion, which might shake it: But I wish to leave the authority of that case unquestioned, because I approve of it. To the case of *Robinson and Bland* I also give my assent. The former of these cases was on a contract entered into by foreigners, bound by no allegiance to this country; and the latter was a contract made in France, which, being warranted by the laws both of that country, and this, was carried into execution here. But in this case, it is admitted, and the plaintiff's counsel was obliged to make the admission, that this must be considered as a contract made in England: But it has been insisted, that no adjudged case is to be found, in which it has been determined that persons standing in the situation of these plaintiffs, shall not recover. But similar cases have frequently occurred at *Nisi Prius*; and the reason why no solemn decisions are to be met with on the subject is, because the *Nisi Prius* determinations were thought too clear to be questioned. Where a contract is made for smuggled goods, a party cannot come into a court of justice to recover on it. A person suing in a court of law must disclose a fair transaction; and it must not appear, from his own showing at least, that he has infringed the laws of his country. Now, here three of the plaintiffs lived in England, and it is clear that they knew either personally, (or which is the same) by their agent, the other party living at Guernsey, that the contract which they had entered into was made in direct contravention of the laws of their country; for the goods came under more than suspicious circumstances, *since they were sent in slings and half anchors ready for smuggling*. And it requires much argument to convince me that a contract thus made can be carried into execution in England. There is no *dictum* in favour of the plaintiff's right of action; and the whole string of cases by analogy is against it: Therefore I am of opinion that non-suit ought to stand.

Ashurst J.—I form my opinion on this circumstance, that three of the plaintiffs lived in England; and therefore, though the partner with whom the contract was made lived abroad, this case must be considered in the same light as if all the partners lived here. It is not necessary to determine whether a person who sells goods in England, which are afterwards to be applied to an illegal purpose, can recover the price of them here. For in this case the goods were sold and delivered, not in England, but in Guernsey, and *packed too in such a manner as to show that they were intended for the purpose of smuggling*. The plaintiffs were agents to the very act of smuggling; they were *participes criminis*, and therefore cannot avail themselves of the laws of this country, in order to enforce a contract made in direct opposition to them.

Buller J.—This case must be considered as if it were a contract made between the plaintiffs and the defendant, all residing in this country, for the delivery of goods in Guernsey, for the purpose of smuggling them into England. And I use the latter expression, because it is clear from the manner in which they were packed at the time when they were delivered, that they were intended to be smuggled:

† *Ante*, 418.

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ed that matters were in a very different situation, for the defender cannot render his security effectual without having recourse to the laws of this country, and it is there that the objection of *pactum illicitum* will apply. In fact, it is the defenders, not the petitioners, who are in *petitorio*, it is they who are demanding payment of their debts out of the funds belonging to Nisbet's creditors.

Opinions.

Lord Swinton.—A foreign merchant knowing the smuggling laws of this country, who has been accessory to a smuggling adventure, cannot pursue for implement of the smuggling contract; were such an action to be sustained, he would derive advantage from those very laws which he had violated.

Lord President.—I observe there is a distinction attempted to be made here, betwixt the charge for furnishing a cargo to be smuggled into this country, and that for repairing a vessel intended to be employed in the smuggling trade.

Lord Swinton.—The ship was fitted out for the purpose of smuggling, and that is the same with furnishing goods, and enabling the merchant here to violate the revenue laws.

Lord Hailes.—I can understand this, if the furnishing be of so peculiar a kind, that it can leave no doubt of the destination of the vessel; such, for instance, as fitting out a vessel for the Greenland fishery: But I doubt greatly, whether a man's paying the expence of a common repair which does not show the purpose for which the vessel is destined, can be considered as an accession to smuggling.

*That was the act of the plaintiffs; and I cannot say in a court of justice, that the plaintiffs, so offending against the law of the land, shall be permitted to recover on such a contract. None of the cases cited apply to the present. That of Helman v. Johnston went on the ground of the plaintiffs being foreigners, which materially distinguishes it from this, because the subjects of one country residing there, are not bound to take notice of the revenue laws of any other. That maxim has been long since adopted here, and recognized by Lord Mansfield, in Helman and Johnston. But this is the case of one of the king's subjects making a contract directly against the statute laws of his country. Neither has the case, Petrie v. Hannay, any relation to the present: Here the contract on which the action was founded is illegal, which was not so there; and in order to make this case like that, it is necessary to show that these plaintiffs were not concerned in the original transaction, but afterwards paid money for the use of the defendant, which they wished to recover back; for there the money was paid to a person who was not a partner in the original transaction; and the action was founded on the subsequent contract, and not on the stock-jobbing transaction.*

Grose, J.—Of the same opinion.

M. J. Buller then said, that another objection had been made at the trial, that the plaintiffs ought not to be non-suited, and that it should have been left to the jury to consider whether the plaintiffs knew the goods were to be smuggled. But that he had been of opinion, that, as the counsel on both sides had fully argued the question of law in the admission of facts, the plaintiffs ought not to be at liberty to go to the jury on the same facts, when they found his opinion against them in point of law; to which the Court assented.

RULE discharged.

Lord

Lord Swinton.—In this case the contraband goods were furnished and the ship repaired for carrying them to this country, by the same person.

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Lord Justice Clerk.—I never heard of these repairs before; my idea was, when I pronounced the interlocutor under review, that this man not only knew of the intention to smuggle, but was accessory to it by the assistance he gave to the merchants in this country.

Lord President.—What better is this debt for being heritably secured? it can be no better; and the only question is, whether it was good originally?

Upon the vote being put, their Lordships adhered to the judgement of the Lord Ordinary.

|                                 |              |                    |           |
|---------------------------------|--------------|--------------------|-----------|
| For the Pursuer, Lord Advocate, | } Advocates. | G. Johnston, W. S. | } Agents. |
| Defender, Dean of Faculty,      |              | B. Whyte, W. S.    |           |
| Lord Justice Clerk Ordinary.    |              | Menzies Clerk.     |           |

Vol. VIII. No. 3.

## POINDING.

ROBERT FIDDES Tenant in Pitgerlo of Foveran.

AGAINST

GEORGE FYFE Messenger in Aberdeen, and WILLIAM CORBET  
Officer of Excise in Aberdeen.

A person appearing at a poinding, purchasing the goods, and paying the price, and the messenger under the notion that the goods were purchased for behoof of the debtor, poinding a second time, the messenger was found liable in repetition of the price, and in expences of process, although, in the second poinding, the purchaser neither claimed the goods, nor took the oath that they were his property.

UNDER authority of a horning, raised at the instance of William Corbet, for a debt due by James Walker of Torrielieth, George Fyfe messenger poinded effects belonging to the debtor, estimated at L. 28 Sterling. The goods were carried to the market-cross of Ellon, where they were appretiated, and offered to sale at the appraised value. Robet Fiddes the  
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pursuer offered this value, which was accepted by the messenger, and instantly paid to him; when, upon the footing that the pursuer had made the purchase for behoof of the debtor, the messenger executed a second poinding, and carried off the whole articles to Aberdeen, at the same time that he retained the L. 28 in part of the debt due to William Corbet, which exceeded both this L. 28 and the value of the articles carried off. The articles brought to Aberdeen were sold by the messenger, and a considerable profit made of them, according to the pursuers account, though according to the messenger's, they were sold at little more than the appraised value.

Upon these circumstances Fiddes raised an action against the messenger, and his employer Mr. Corbet; concluding for having the goods restored, or the defenders ordained to pay back the L. 28 received from the pursuer as the value of the goods, with L. 100 *nomine damni*, and as the expences of plea.

June 16. 1791. This cause came before the Lord Justice Clerk as Ordinary, when his Lordship, after hearing parties, pronounced the following judgement: " Finds the defenders liable, conjunctly  
" and severally, to the pursuer in repetition of L. 28, being  
" the amount of the appraised value, with interest from the  
" 1st February last, and decerns; finds expences due, and allows an account thereof to be given in; but assolzies the  
" defenders, from any claim of damages, and decerns." This judgement was adhered to by the Lord Ordinary, and then brought under review of the Court by petition, when the Court  
Mar. 10, 1792. " adhered to the Lord Ordinary's interlocutor reclaimed against, and refused the desire of the same."

Argument for  
the pursuer.

In bringing these judgements under review on the part of the pursuer it was asserted, that he had borrowed the money, with which he made the purchase, from three different merchants, in the town of Ellon, to one of whom he offered a share in the purchase; that the sale by the messenger was necessarily an offer to the public, and being accepted of by the pursuer, and the price paid, he was entitled to the full value of the property. Bankton, B. IV. tit. 41. § 2. § 13.

Argument for  
the defenders.

On the part of the messenger it was said, that he had executed the second poinding not only in terms of the directions given in the Office of a Messenger, (a book in the hands of every messenger, and by the directions of which he conducts himself,) but it had been executed under authority of Lord Bankton's opinion: That it was a transaction from which no profit of any kind could arise to the messenger; and besides, that if the pursuer has suffered any loss, he had himself to blame, for not taking the oath required of him, by which the property

of the goods would have been ascertained, and a second pointing prevented, had they been fairly purchased by the defender.

And for Mr. Corbet, the creditor, it was said, that he had done nothing to render him liable in damages; he had given the diligence to the messenger, with directions to execute it, and under these instructions, and in the manner in which the messenger had conducted himself, he could not be liable. Besides, he stated, that it was a peculiar hardship to find himself harrassed by a law suit, when, from the first moment, he had offered to pay the L. 28 to the pursuer.

Lord *Eskgrove*.—The parties are not at one in regard to the fact. The messenger says, he was desired to do what he did: But this is denied by Corbet his employer; and I understand it to be the case that the messenger resold the pointed effects, and that he has the price still in his hands: if it be so, I see no ground for deciding against Corbet; we should in that way allow this messenger to pocket the profits.

Opinions.

Mr. Gillies, on the part of the messenger, stated in point of fact, that the money was in the pocket of Corbet's agent:

Lord *Justice Clerk*.—We see strong averments made now; but formerly, from what I saw in the cause, I understood that the pursuer was interfering for behoof of the debtor, and it was on that ground I found him entitled to the price, to the effect of relieving him; and I gave no claim of damages, because purchasing for the common debtor, he had no title to damages.

Lord *Eskgrove*.—I have no notion that if the pointed value be paid, a messenger may point *de novo*; it is impossible to allow of such a thing. A person gets his friends to advance money in order, I shall suppose, to purchase up his household-furniture, or a bed for his wife to lie on, is it possible to say, that in such a case, the messenger shall be at liberty to repoint these goods as belonging to the common debtor: I never shall be of this opinion. This repointing was illegal, and the consequences of it should be at an end; the purchaser should be indemnified. The common debtor or purchaser, must have either the goods or their full value.

Lord *Monboddo*.—I am of the opinion given by Lord *Eskgrove*. There ought to be no repointing. I can understand an oath in the first pointing, and I think it may be properly put. But after the goods are sold, and the price paid, the messenger sees that the goods are the property of the purchaser; but here he caried off the goods, and the price: this petitioner is entitled to be fully indemnified.

Lord *President*.—One of your Lordships was not here when this question was last decided; all of the judges then present agreed

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agreed, that when goods were purchased by the common debtor, or by his friends, the opinion of Lord Bankton, and the directions in the Office of Messenger, were erroneous; they could not be repointed: and I agree with all your Lordships, that the repointing was erroneous. But this is not the question, when the goods were carried to Ellon, the messenger offered them to sale, and they were purchased by Fiddes, and should, he says, have been delivered to him on payment of the price: But the messenger having conceived that the purchase was made for the behoof of the common debtor, there was a second pointing executed: This second pointing was made in presence of all the parties; and this messenger, according to his execution, offered them in the same way that he did at first. Fiddes should then have claimed the goods, and he should have taken the oath: he did not take the oath, and consequently the messenger had reason to believe that the goods were not his. The thing, therefore, in which the messenger did wrong, was to make a second pointing; but he did this in conformity with Lord Bankton's opinion, and in consequence of the directions given in the Office of a Messenger, and you have given redress. In what respect then did Corbet do wrong? It is said that the messenger was instructed to point a second time; this, however, is not proved; and is not probable, as it is not customary to give such directions, therefore I cannot see how he is to blame: in short there was no person to blame but the messenger, and he followed the common practice. Lord Justice Clerk's decision in this case is therefore a proper one. But it is said, that a profit has been made on the sale of the goods, and it is asked to whom this should go. To the messenger: by no means, you never meant it: The price is in the hands of the sheriff, as appears from the papers before you; and it has been argued, that it should go to the common debtor. No says Fiddes, it must go to me. This is a short question, and it is one hitherto undecided by your Lordships; it is this, which of these two shall have this profit: now when this question comes before us, for it has not yet been under our consideration, I shall think, (unless I see more on the part of Fiddes than I have yet seen,) than it ought to belong to the common debtor; for it is he who is entitled to favour.

Lord Eskgrove.—I may be mistaken, but I am of opinion with Lord Monboddo, that the circumstance of the purchase having taken place in the presence of the messenger should render an oath unnecessary; and it is not sufficient to entitle a messenger to execute a second pointing, that he has taken it into his head, on seeing a third person purchase, that he has purchased for the common debtor: It is contrary to common sense and good faith. Now, shall we say that a pointing

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ing is not good in such circumstances, and that it is competent for this man to come with an action, in order to show that his goods ought not to have been poinded for the debts of another; and yet when he has brought this action, and called the proper parties into this Court, are we not to decide here, whether the messenger, Corbet, or his agent, are bound to pay the value of these goods? But I shall further suppose Fiddes to have been no more than a trustee, we are all of opinion that the second was an illegal poinding; is there then a clearer proposition than this, that *spoliatus ante omnia rebus situtus est*. Even were it to be said that retention has any thing to do in this question; and were we to sustain that plea, we should then have gone the length of saying, that a person was entitled to retain stolen goods. As therefore even retention cannot be pleaded, we must give Fiddes the goods, or their value.

Lord Monboddo.—The second poinding was improper, and the purchaser has nothing to do with it. He was not obliged to swear that the goods were his: But what do you say to that circumstance, that the messenger carried off the goods, and that the price has not been restored? It is a most illegal proceeding.

Lord Swinton.—I have given all possible consideration to this case. It seems to be the opinion of the whole Court that the goods cannot be repounded: But I cannot subscribe to this opinion. It is the common practice to execute a second poinding, the Office of a Messenger shows this to be the case; and let us suppose that the common debtor comes openly, and purchases the goods, the messenger refuses to take his money, and tells him that he will get more for the goods. Fiddes made his purchase precisely in the place of the common debtor, and as he would not take the oath that the goods were his, the messenger was entitled to consider the goods as really the property of the common debtor. I therefore think the second poinding right.

Lord Justice Clerk.—It is a question of great nicety, whether it be lawful to execute a second poinding under such circumstances as occurred in this case. The practice has at least strong authority in its favour, and that would prevent me from finding a messenger guilty in a spuilzie who had acted in conformity with the general practice. But that question does not occur here; all that has been decided is, that Fiddes was acting for the common debtor, that no person was entitled to take from him the goods which he had purchased, without repaying him the price; and it was on that account I found him entitled to the price, and to the expences of process: But if there be any thing wrong in the second poinding, it is entire.

Lord

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Lord *Eskgrove*.—(read the prayer of this petition). The petitioner now asks delivery of the goods or of the price.

Lord *President*.—Is it not natural for a person whose goods are poinded for the debt of another, to say these effects are mine. This was not done; Fiddes would not even swear to the property, and that convinces me that they were the property of the common debtor: it is upon this circumstance I go; but if the Court are to decide upon the case in the light taken up by Lord *Eskgrove*, let the parties go to proof.

Lord *Eskgrove*.—If the messenger brings the goods to the cross, he must hold that person who gives him the money as the proprietor of the goods, and is not to proceed upon his own whim.

State of the vote.

Adhere, Lords Abercromby, Dunsmann, Justice Clerk, Alva, Henderland, Swinton.

Alter, Lords *Eskgrove*, Dreghorn, Monboddo, Stonefield, Ankerville.

Carried, Adhere.

For Fiddes, John Gordon,  
Fyfe, Adam Gillies,  
Corbet, Arch. Fletcher,

} Advocates,

Cof. Falconer,  
Geo. Watson,  
Tho. Gordon, W. S.

} Agents.

Lord Justice Clerk Ordinary.

Sir. J. Colquhoun Clerk.

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PRSCRIP-

## PRESCRIPTION.

**I. AGNES FORSYTH, residenter in Faulkland, Pursuer;**

AGAINST

**Lieutenant GEORGE SIMPSON, residing in Strathmiglo,  
Defender.**

A claim for the aliment of a bastard child, at the instance of the mother, where there has been no constitution of it, falls under the triennial prescription.

IN April 1773, Agnes Forsyth (who had formerly born two bastard children) was delivered of a son, and Lieutenant Simpson allowed that he was the father, and bound to support the child. The mother nursed the child, and kept it for about a year, when having married one Deas a soldier, she went with him to the north of Scotland, and remained for some time. During the absence of Agnes Forsyth, the child was taken care of by her father and mother, and it seems to be admitted that the child was under their care, until he was able to support himself.

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In the 1790, at the distance of seventeen years from the birth of the child, an action was brought by Agnes Forsyth, against Lieutenant Simpson, concluding for "L. 3, as one half of the " in-lying charges, with interest, &c. *Item*, for the sum of " L. 100 Scots yearly, for the aliment, education, and cloathing of the son, from the 11th April 1773, to the present " period, with interest, &c."

The defence pleaded in this action was, that as the boy was now upwards of sixteen years of age, and had, for more than three years preceeding, been able to aliment himself, any prior claim is debarred by the triennial prescription of the act 1579, c. 83. This defence was sustained by the Lord Ordinary; but the pursuer having founded on the case of Paterson v. Cochran, 14th February 1758; his Lordship ordered the defender to condescend on the payment and furnishings he had made in extinction of the pursuer's claim.

The defender accordingly condescended on payments to Agnes Forsyth, amounting to L. 7; and to her father and mother amounting to L. 12 more, with several furnishings of potatoes, &c. to both; and he stated that he had put the boy to an apprenticeship.

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Nov. 20, 1792.

On advising the cause the Lord Ordinary adhered to his first judgement, “ sustaining the defences founded on the “ triennial prescription, assailing the defender, and decerning.” This judgement was brought under review of the Court by the pursuer.

Argument for  
the pursuer.

The triennial prescription does not apply to this case. The words of the statute are, “ That all actions of debt for house “ mails, mens ordinarys, servants fees, merchants accounts, “ and other the like debts, that are not founded upon written “ obligations, be pursued within three years, otherwise the “ creditor shall have no action, except he either prove by writ “ or by oath of his party ;” and as debts constituted by writing are excepted from this prescription, so must the present, which is not only tantamount to any that writing could have produced ; but complete, independent of all writing.

Whether the imperfection of parole proof, at the distance of three years ; or a presumption of payment ; was the ground of this enactment, it is evident, that the only use of the written obligation was to prove the constitution of the debt ; and had the defender granted bond for the aliment of the child, the prescription could not have applied : It remains then to be considered, whether the present case be materially different.

The defender admits that he is the father of the child, and the aliment due by the father is a debt *ipso jure* : an obligation for the payment of this debt would therefore have been useless, and the want of it must be equally immaterial ; consequently the pursuer thinks herself entitled to conclude, that the debt does not fall under the triennial prescription ; a conclusion founded equally on the spirit and scope of the statute : For, on the one hand, the debt is constituted without parole proof, (the lubricity of which the statute may be supposed to guard against,) and on the other, a written document would naturally be required in extinction of a debt, which, in its nature, was more certainly constituted, than it could have been by the intervention of writing.

The only case similar to the present, is that of *Pateron v. Cochrane*, dated 14th February 1758, Dict. vol. III. p. 304, 305. “ The mother of a bastard child pursued the father for “ aliment ; who pleaded, that several years ago he had paid “ about L. 100 Scots, at different times, to the mother ; and “ that as she made no demands for many years, the claim was “ prescribed by the act 1579. Answered, that a natural obligation was not subject to prescription. The Lords \* repelled “ the

\* It must not be understood from this decision, that the Court repelled the defence of prescription. The truth is, that according to this report there was no defence to repel. The defender admitted that the debt was due ; and when he added that it had fallen by the triennial prescription (which prescription is founded on a presumption of payment), he only added what was incompatible with his own admission.

“ the defence, and found the defender liable in a yearly al-  
 “ ment of L. 40 Scots till the child was fourteen years of age.”

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The enactment of the statute which introduces a triennial prescription “ of mens ordinaries,” that is of aliment, applies so directly to this case, that there is no occasion for any disquisition into the meaning of the general expression of “ other the like debts.”

Argument for  
 the defender.

This very question occurred in a case observed by Bruce, 25th July 1718, Hamilton v. Lady Ormiston, (App. to the 3d vol. of Fac. Col.); where it was found, that aliment prescribes *quo ad modum probandi* in three years; and in that case a former decision to the same purpose is referred to. And in the Dictionary of Decisions, January 1722, Cuming v. Andrews, there is a similar decision.

Lord Kilkerran observes the following case, *voce* Prescription.  
 “ In a process against the heir of a minor for her aliment, an  
 “ Ordinary having repelled the defence of the triennial pre-  
 “ scription, upon this ground, that all the particulars mention-  
 “ ed in the statute fell under either sale or location; where-  
 “ as aliment furnished to minors without paction falls under  
 “ neither, but is a *negotium gestum*. That further, all the  
 “ cases mentioned in the statute are of debts that are in use  
 “ to be recently paid, and without taking discharges, in writ-  
 “ ing, which could not be said of aliments furnished to minors,  
 “ which are not in use to be paid by curators during minority,  
 “ without a written document. Upon a reclaiming petition  
 “ the Lords found, that the aliment fell under the triennial  
 “ prescription; they thought it unreasonable that the previ-  
 “ lege given to a major, should not be competent to a minor,  
 “ of pleading this prescription; and that contrary to the genius  
 “ of the law, a minor should be less privileged than a major,  
 “ 16th February 1739, Davidson v. Watson.” This decision,  
 it is true, was reversed on appeal; but this reversal seems to  
 have proceeded upon this, that had the aliment been paid it  
 must have appeared in the accounts of the curators.

The case quoted by the pursuer, Paterson v. Cochrane, proceeded upon specialties not at all applicable to the present case.

It is unnecessary for the defenders to enlarge upon the observation, that the debt arises *ex debito naturali*; for the same presumption takes place as in merchants accounts and the other debts mentioned in the statute, arising from the delay of a judicial demand for more than three years, and the effect is to cut off a proof by witnesses.

Lord Justice Clerk.—It is of no consequence whether the claim arose *ex contractu*, or *ex debito naturali*; the principle of

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II.

it may be the ground of an action there; but the statute refuses such action in this country. The Law of England, according to which, it is said, these bonds are not prescribed, has no authority here; to give it effect would be to overturn the Law of Scotland in regard to the negative prescription.

Again, by the act 1474, c. 55. it is enacted, "*Item, An-*  
 " entis the acte maid of before, of prescription of obligations,  
 " it is ordained to be understandin in this wise, that all auld  
 " obligations maide of before, that is elder than the dait of  
 " fourtie ziers, not dependent in the law, in the time of the  
 " making of the said actes, fall be prescribed, and of nae  
 " strength; and likewise in time to cum all obligationes maid,  
 " or to be maid, that beis not followed within fourtie ziers, fall  
 " prescribe, and be of nane avail."

The words of this statute are as general as the former, and leave no room to suppose that any exception was intended in favour of debts contracted in England. Ignorance of our laws of prescription, can be the only plea for contending, that actions upon foreign obligations, should be excepted; but to this plea the statute pays no regard, for it strikes against all grounds of action, which at the time of enactment were older than forty years; and yet the plea of these creditors, must have been infinitely stronger than the plea of a foreigner can be. It seems therefore obvious, that the legislature, meant to establish the general rule of prescription, in opposition to any equitable plea arising from *ignorantia juris*.

The last statute is the 1617. c. 12. the preamble of which it is necessary to attend to, as it expresses the solid grounds of expediency and justice, upon which prescription was considered by the legislature to be established. The danger there dreaded is, that forged and false writs and obligations may be sued upon at a distant period, when the means of detecting the forgery are lost. But the danger is increased by admitting foreign deeds, for to the obscurity arising from length of time is superadded that arising from distance of place.

The words of the statute also are perfectly general, it excepts minors, but makes none in favour of foreign obligations; so far from excepting them, the legislature took it for granted that, by the laws of all nations, pleas at the distance of thirty or forty years, were ineffectual. But because a nation is so unwise, as to have no law establishing the forty years prescription, must it follow, that in actions from that country, we are to sacrifice our own law and to give way to an absurdity, such as our legislature did not suppose to have existed.

The objectors submit the whole of these laws to be not only pointed and clear, but perfectly general, enacting, that where action is to be brought upon an obligation, it can be brought only within forty years.

This

This is a question upon which our own lawyers, as well as the doctors of the civil and foreign law, have given their opinions, and decided in favour of the law of the country in which the action is brought. Ersk. b. III. tit. 7. § 48, Prin. of Equity, p. 125, 283.

In the opinion delivered by Mr. Erskine, he says, that the question must be regulated by the law of the debtor's present *domicile*. But he evidently means the *domicile* acquired by being within the jurisdiction; for the reason he gives is, that all Courts must judge by their own municipal laws. Many cases have occurred, where there has been a collision between the laws of Scotland and England, and in all of them, the Court have confirmed the opinion delivered by Mr. Erskine, under this one exception, that a deed executed with the formalities of the *locus contractus* has been held *ex comitate* to be effectual here. The general rule has been established in the following cases, Lord Fountainhall, 27th January 1710, Savage v. Craig. In this case, Philip Savage, Chancellor of the Exchequer in Ireland, had lent L. 800 Sterling to Mr. Craig; for security of which he got a mortgage upon an estate in Ireland, and a personal bond, in the English form, for L. 1600. In an action before the Court of Session, the demand was, by the decision of the Court, restricted to the principal sum, with interest at the rate of 6 *per cent.* although in Ireland, where the contract was entered into, 10 *per cent.* was the legal interest; nor would the Court permit the creditor to insert in his discharge a reservation of his claim upon the Irish estate, for any further demand he might have in terms of the law of that country. And, in another case, Kinloch v. Fullerton, 10th July 1739, the Court found the heir of a debtor in a promissary note granted in England, liable for the debt, agreeably to the law of this country; although it was represented, that, by the English law, the heir would not have been liable, unless the debtor had bound his heirs as well as himself.

The same abstract question has been decided in the case of English bankrupts having effects in Scotland, as in the case observed by Lord Kilkerran, *vacc* Foreign, Ogilvy v. Creditors of Aberdeen (see the title Bankrupt of this collection, p. 96, and 99.); and it has now been established in various other cases, that the Scots effects of an English bankrupt, must be attached by the forms of diligence of this country.

The case of Syme v. Thomson, 6th July 1758, is an instance, where the Courts here judged of subjects situated in England by the laws of this country. Jackson, a Scotsman, carrying on trade here, had debts due him in England to the extent of L. 800; and, within sixty days of his bankruptcy, he went into England, and there made a conveyance of these debts to one of

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of his creditors. This conveyance was reduced upon the act 1696.

The very question at issue has been frequently decided in regard to the triennial prescription, which of all others is the most unfavourable ; and it is now an established point, that the Scots triennial prescription, does apply to debts contracted in England. This was solemnly decided in the case *Randall v. Innes*, 13th July 1768. The very same argument was used there, which has been used by the claimants. It was said, that the debt was due by the laws of England, and although a creditor must come to the forum of his debtor, it does not follow that his claim is to be decided by the laws of that country. But to this it was answered, that the constitution of a debt was no doubt regulated by the law of the country where the obligation was entered into ; yet when an action is brought for payment in this country, prescription is an exception, which being competent in our law, must be received : and so it was decided by the Court. A similar decision was given, 7th January 1771, *Kerr v. Earl of Home*—4th February 1722, *Barrack v. Earl of Home*.

And, upon the very same principle, has it been decided, that the prescription introduced by the English statute of limitations, could not be pleaded against an action brought in this country, even though founded on an English debt, 7th July 1755, *Trustees of Renton v. Baillie*.

Upon the same principle also, the Court has decided questions betwixt the York-buildings Company and their creditors. Thus, in the 1727, *Rowland Ainsworth v. the Company*. The Company had, in the 1726, granted many bonds for L. 100, payable with interest after the rate of 4 per cent. per annum, on the 12th April 1732 ; and although there were opinions produced by the Company, from the most eminent English council, that neither the principal nor interest of these bonds were payable before the 1732, yet the Court found interest due annually. And in the same question, Ainsworth having, upon a conclusion for payment of the principal when it fell due, arrested the rents in the hands of the Company's tenants, the Court refused a petition, praying to have these arrestments taken off, although it was asserted, that by the law of England, no diligence could have followed upon these bonds till the arrival of the term of payment.

The same principle is explicitly laid down by the Roman lawyers, Voet, *De rerum divisione*, lib. I. tit. 8. § 30. and in the title, *De diversis temporalibus prescriptionibus*, &c. ; and the real foundation of the opinion given in these passages is laid down, lib. I. tit. 4. par. 2. § 5. The sentiments so clearly expressed in the passages here referred to are universally admitted to be just, and they are the foundation of the opinion deli-

delivered by Mr. Erskine, upon which the objectors have founded above.

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From these decisions and authorities, the objectors apprehend it to be proved, that the bonds claimed on must be judged of by the laws of this country. Indeed to follow any other rule would lead to inextricable confusion; for thus, in a ranking of creditors, the Court might be forced to sustain and to repel the same objection to different grounds of debt, according to the laws of the different countries from which the claims happened to come; and to judge of them with precision, our judges ought to be acquainted with the laws of every country in the world. But it would be impossible to do justice if the laws of different countries were to be followed; whereas, by deciding questions solely on our own laws, there can be no difficulty in determining any question that can occur.

The argument upon which the claimants will principally insist, will probably be this, that the sustaining the objection to prescription, must lead to this absurdity, that for one and the same debt, the persons of the debtors, and their effects, would be liable in England, and altogether free in Scotland.

But this is no good reason for over-ruling the plea of prescription. It is a necessary consequence of different laws being established in different countries, having independant territorial Courts; the two Courts will pronounce different judgments, and both right, because both agreeable to their own laws. Examples of this will be found in all the cases formerly quoted, to show that the general rule was to adhere to the law of Scotland: and if any inconveniency shall be said to arise from this, the answer is, that it is unavoidable so long as different systems of laws are established in different countries.

It must be allowed that the objection, entered by the Company, is extremely unfavourable, since their books afford evidence, that the bonds now claimed on are still unpaid. But the objection is adverse to the principles of general law; although the negative prescription of the law of Scotland may be resorted to, to cut down bonds entered into in Scotland, it cannot in justice be applied to the bonds in question. The proper forum of the York-buildings Company, was and is in England. The bonds in question were issued in the English form; they were purchased in Change Alley; they have every ingredient of an English, and none of a Scots transaction in them; and although the claimants are forced to come to this country, to attach the estates of the Company, the municipal laws of this country, cannot annul obligations which are still good grounds of debt in England.

Argument for  
the claimants.

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There is no statute of limitation in England similar to the negative prescription in Scotland. In the case of bond-debts, a presumption of payment indeed arises where no demand is made for twenty years; but it is a presumption only: and it is uncontravertible that the claimant's bonds are still unpaid; these bonds are therefore equally actionable and equally effectual in England as they were the day after they were first issued; and it would be strange were the law of a country so absurd as to prevent a lawful creditor from attaching the effects of his debtor, notwithstanding that a decree has or may be obtained against such a debtor before those courts to which he is more immediately subject.

The negative prescription was introduced into the law of Scotland by the act 1469, c. 28. and by the act 1474, c. 54. The words of these acts go to the foundation of the right itself, and cut off the obligation, if it has not been followed out within the forty years, and every attempt to make it effectual against the estate of the debtor must prove abortive. But if the obligation be kept in force, it is no where said that action shall be denied for rendering the debt effectual out of the estate of the debtor.

It may indeed be objected for the Company, that altho' the claimant's bonds may still be good in England, yet the judges in Scotland ought not to sustain action upon them, in opposition to their own law. But laying aside the impossibility of holding debts to be extinguished, which are subsisting debts in the forum where the debtor has his *domicile*, it is plain the negative prescription never could be meant to extend to foreign transactions.

A general principle is, that the *lex loci contractus* regulates the constitution of an obligation, and the same holds in the transmission of obligations: Hence the statute against blank deeds will not extend to the blank indorsements of English bonds; and questions relative to the dissolution of contracts are regulated in the same manner. The payment of a Scots bonded debt cannot be proved by witnesses; but our courts admit of a proof by witnesses where the debt was contracted in England.

But if such be the rule with regard to the constitution, transmission, and extinction of obligations, it is not easy to perceive, why a different rule should take place with regard to their endurance. If an English debt is cut off, or limited by an English statute, this qualification of the debt ought to follow it, because the parties must be understood to have regulated their conduct by the Law of England; and, on the same ground, an obligation entered into in England, which is still valid and subsisting there, ought to be sustained as the ground of action in Scotland, notwithstanding a particular limitation of such

such obligations in Scotland. Indeed there is greater room for doubt where the judge is called upon to give effect to the statute law of another country, than where, as in this case, he is called upon to determine only according to the general principles of the law of nations, by which a man who has granted his bond, is bound to pay it, unless he can prove some good objection against it. If the debt be a subsisting debt in England, where it was contracted, and where the parties live, the question is, why the debtor should not be obliged to make satisfaction out of his estate, where-ever situated.

Many cases have been quoted by the objectors as establishing this point, that in questions of prescription, the Court were bound by the law of Scotland as the *lex loci*: But these decisions proceed upon this ground, that Scotland was the *forum rei*, and the debts Scots debts; whereas here the debts are due by an English Company, who happen to have estates in this country. Thus, in the cases of Kerr and Barret v. the Earl of Home, where the triennial prescription was sustained, had the Earl left property in England, so that the debt could have been constituted against him there, or had it been constituted in consequence of his Lordship's having had personally a forum there, the Court would undoubtedly have overruled the plea of prescription.

With regard to the English bankrupt laws, the Court have now come to give effect to statutory or judicial transfers, in nearly the same manner as to voluntary transfers; and that rule, *mobilia sequuntur personam*, has now obtained its full force.

The objectors have said, that the Scots statutes establishing the negative prescription, operate only upon the right of action, not upon the obligation: But these statutes expressly say, that the obligation upon which no document is taken for forty years, shall be prescribed, and of none avail: consequently the obligation itself is dissolved. We have instances, no doubt, where the prescription is directed against the evidence of the obligation, and not against the obligation itself: Thus, bills, after the lapse of six years, evidence of the delivery of merchant goods after the expiry of three years, &c. In these cases the obligation remains, and when established by the oath of the party, is a good ground of action: But in the long prescription, the obligation itself is extinguished, and an admission by the granter that it was not fulfilled, would not rear it up against him.

The great error in the Company's argument lies here: They do not distinguish between the *situs* of the right of the creditor, and that of the obligation of the debtor. The obligation may be under the influence of one law, and the right to the benefit of that obligation under another. Thus, it is now

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settled, that the right to the obligation transmits according to the destination of the law of the *domicile* of the creditor, but the obligation itself must remain under the influence of the law of the *domicile* of the debtor. Had the Company been a Scots corporation, the claimants have no occasion to dispute, that though they had issued their bonds in England; the English law could not have secured these obligations against the Scots negative prescription; neither could the Scots law have regulated the transmission of these bonds in England, nor subjected them to the law of *legitim*, nor excluded the half-blood as executors.

This distinction kept in view, solves all the difficulties as to the collision of laws in different countries, with respect to *nomina debitorum*; and even the authorities from the doctors may be explained agreeably to it. Thus, in the passage from Voet, there is nothing which says that a debt may subsist in the *forum domicilii* of the debtor, and yet be extinguished by prescription in another forum, where the debtor may have effects: All that Voet lays down is, that the laws with regard to prescription, which operate upon a debt are the laws of the *domicile* of the debtor. But no doctor has said, that a debt, subsisting in the *domicile* of the debtor, is to be held as extinguished in a foreign country where the debtor has effects.

The Company have quoted some decisions, sustaining the Scotch prescription against English claims; but, in these cases, the debtor had removed his *domicile* to Scotland, and had resided there for a length of time; so that there was room for the operation of the Scotch laws with respect to prescription. The other decisions quoted by the Company are either manifestly erroneous, departed from, or inapplicable to the question at issue.

## Opinion.

Lord Swinton.—When this question was last before the Court, I was in the minority †: I have seen no reason for altering the opinion I then held, and I shall now express it in very few words. There is no such thing in the law of England, as our long negative prescription of forty years. Were an action instituted in England, decree would be given for the debt, and the right of action must follow the debtor or his estate. If it be a good debt in England where it was contracted, it must be a good debt every where. Supposing there was a negative prescription in England, which would destroy the

† His Lordship alludes to the cause between the Company and Abraham Delaval and others, when the same question occurred, and was decided by the Court in favour of the Company; which question was afterwards appealed, and the decree reversed upon an *ex parte* hearing.

claim,

claim, and that we knew of no such law, had the ground of debt fallen under this law of prescription, we would have held it as at an end in the same way as if it had been legally discharged in terms of the law of that country; for the same reason, we must in the present case, hold it to be a subsisting debt, and I am clear that the negative prescription does not take place.

Lord *Monboddo*.—I am clearly of the same opinion, independent of the judgement in the house of Peers. This is an English contract, executed betwixt an English Company and Englishmen. Questions arising on that contract, must be judged of by the law of the country where the contract was entered into. Whatever might have been the opinion of our predecessors (and they were various), it is now well established, that the transference must be regulated by the *lex contractus*; and if an obligation be transmitted and conveyed by that law, it must likewise be discharged by the same law. If then this be a subsisting debt, by the law of England, it must be so here.

Lord *Eskgrove*.—I sat here in the 1783 when this cause was decided on a hearing in presence. I looked to my notes, the Court then was different from what it is now; Lord President absent, Lord Justice Clerk did not vote, Lord Kennet dead, and Lords Gardenstone and Elliock not now here. I was then with the majority, and of an opinion contrary to that which has been delivered. Relying on what has been said, that the merits of this case has not been under the consideration of the House of Peers, I shall freely consider this question. I own, after paying every degree of attention to the papers, and revising the former opinions, my decision must be favourable to the judgement which has already been pronounced by this Court. The legislature of every country has a right to frame rules for deciding questions that occur within its own territory. Prescription has been adopted by our legislature from the Roman law; and, in adopting it, they acted wisely. The statute 1617 points out, in the narrative, the reasons for introducing this law. The positive prescription operates by giving a good possession after the expiry of the forty years: The negative prescription can have no hold but by refusing action after the expiry of the same period. Accordingly, if a deed is not followed out by possession, or by some other legal step, within forty years, it is barred from being the foundation of an action. This is the meaning of the act: The whole words are directed against any proceedings in the action. It is declared to be incompetent. There is no other way by which to affect a personal obligation, and to bring it under the negative prescription, than by a *denegatio actionis*. The narrative of the act 1617, applies to both, (read the narrative). This is a wise regulation; it proceeds on the grounds of quieting the minds of persons, preventing of forgery, and the starting up of claims when

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when documents are lost, and the witnesses no more. The legislature is, no doubt, wrong in saying that it is the law of all nations. In England they have no law of prescription (his Lordship expressed his astonishment that this should be the case). It is said that the *lex contractus* regulates the constitution of the obligation; and this is certainly true: This it does *ex necessitate*, as well as *ex equitate*. It is said to regulate the transmission of the obligation; and so it does: It regulates the extinction of the obligation also in some degree, as the one document must be sufficient to destroy the other. A discharge, though not granted in terms of the act 1681, yet if effectual according to the law of England, in which country it was executed, will extinguish the debt: But it does not follow, that an obligation will at all times afford a ground of action in every country. Here the law has said, that no bond, after the lapse of forty years, shall receive action: It is the declaration of the law, that after that period the debtor is not to be subjected in the debt. Nothing can be more inconsistent than to say, that merely because a bond has been executed at the distance of a thousand miles, it shall be held good after the running of the years of prescription. Were this the case, a person whose ancestors have possessed for generations, might be deprived of his estate by a deed executed in a distant country, and after the expiry of centuries. The very reverse of it appears to me to be the proper rule. Were a latitude to be given, I should hold it to be more reasonable to give such a privilege to deeds executed in this country, where we have greater opportunity of procuring evidence to prove its existence or discharge. This statute, by which prescription is introduced, makes no distinction whether the deed was executed here or in a foreign country; the claim is in every case cut down by the expiry of the forty years. When a creditor comes into this Court, he must conform to the laws of this country; and if we should deny action to the subjects of this country, can a foreigner expect that we should sustain it to him? he cannot; nor has he any right to complain. It is said, that it is strange these bonds should be good in England, and not good in this country: But there are local advantages as well as disadvantages; and there are cases where a debt could not be recovered in England from the estate of a deceased, that might be recovered out of an estate situated in Scotland. In the case of the short prescription, which occurred in a question where the Earl of Home was concerned, I remember it was argued, why sustain the triennial prescription, since the debt was actionable in England, where it is regulated by a limitation of six years? But you applied your own law, and excluded the demand, though the consequence was to send the creditor to England to obtain his decree. With regard to the case of bills of exchange executed in a foreign coun-

country, although they are good all the world over; yet were an action brought in England, founded on bills after the expiry of the six years, the action would be refused: had it been brought in this country prior to the 1772, action would have been given. By the statute of that year, a limitation was introduced: It is thereby declared, that bills shall, after the expiry of the six years, be incapable of producing action or diligence, (read the clause). I consider the meaning of this act, and of the act 1459, to be precisely similar: Action is denied in every case without distinction. The legislature seems to have had in view to free the lieges of every demand that has not been made within the space of forty years. It proceeds on this idea, that the claim must have been a bad one, or it would have been followed out in a shorter space of time. This is a salutary law, and I shall regret to see it shaken in any degree. The plea of *non valens agere*, I admit to be good, and to afford an interruption of prescription, where it is founded in fact. When a man says I could not possibly take a document of my debt till yesterday, prescription cannot affect his claim: But if there be a forum of any kind, there the creditor can take decree, and there is an end of the exception. Were you to sustain action, you would make it competent to pursue for a debt at the distance of a century, merely because it was constituted in England. Now, what was the forum of this Company? They were erected into a Company by charter for raising Thames water, to supply the city of Westminster: They changed their situation so early as the year 1715; at this time they transferred their property from England to this country, and employed it in the purchase of forfeited estates: They continued in the possession of these estates, and in conducting other business in this country down to the 1733. or 1734; in the 1735, there is a process of ranking and sale, brought before this Court; these claimants, then, were called to come into Court upwards of fifty-seven years ago. Were they ignorant of these transactions? did they not know that they could have brought their action in this country? they cannot say so; the evidence is against them: who then were these creditors to sue? not a bankrupt Company in England: no; they were to come to his country, where the Company had real estates: it was here that every man of sense, who had a claim against that Company, came; for it was here only that it could be sued with effect. Holding it to be the case, that this was the forum of the Company, and the place where document ought to have been taken within the forty years, I must, as a Scotch judge, bound to administer justice according to the law of this country, and according to the law of no other, deny action after the lapse of the forty years.

Lord

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Lord *Dregborn*.—I understand the argument of the creditors to be, that this is an English Company; that the debts were contracted in England; and that, by the law of that country, action would be sustained for them. Suppose then we sustain the plea of prescription, these creditors go to England, and obtain a decree of the judges there, with which they return to this country, in order to have it carried into effect: would not you sustain that decree when it was produced in this Court? I do not see how I can make a distinction betwixt that case and the present. It is inconsistent with reason that a municipal statutory regulation should affect creditors who have no opportunity of knowing any thing of them: I am for repelling the negative prescription.

Lord *Henderland*.—I have given all that attention to this case which the importance of it requires. This is a claim on an estate situated in this country, the property of a company subject to our jurisdiction, and the claim is made by a foreigner, bound to submit himself to our laws. There is nothing in the situation of these creditors which can authorise us to yield up the laws of our own country, from which alone we derive our jurisdiction. All that I have heard in favour of the demand is, that the creditors would obtain a decree in an English Court, and that they ought to obtain the same here. But to depart from our established law, and to give way to the law of another country, is a dangerous precedent. It has been said, 1. That it was hard that the creditors should have an action in England and be barred in this country. 2. That the laws of all countries ought to be the same. But to this I say, that it is not hard to deny the creditors action: It is in conformity with our own laws, and if they have action in their own country, so much the better. It is absurd to say, that the law of all countries ought to agree. The constitutions of different countries must vary, according to the genius of the people. In some they admit of a twenty years silence in bar of action; we have in this country a prescription of forty years, a rule of safety, a defence given by the law, against actions brought beyond the stated period. There are natural modes of dissolution of obligations, which ought to be admitted in all laws. These must be regarded in so far as they are not inconsistent with our laws; but we cannot allow them to destroy the municipal laws of our country; *comitas* does not go so far, we are bound to follow our own law as to estates situated in this country, and with persons subject to our own jurisdiction. It has been said, that decree would have been obtained in England: but that would be no ground for an adjudication here; you must obtain a decree of this Court, constituting the debt. Now, although the English decree may be *prima facie* evidence for founding a decree of this Court; yet, when it is was examined,  
and

and found contrary to our law, and contrary to justice, it would be rejected : Therefore I am for adhering to our own law ; I am obliged to it, not only by my oath of office, but my inability to judge by any other law. It is impossible for judges to study and know the laws of other countries : I am bound to decide by the law of Scotland.

Lord Justice Clerk.—This cause is a very important one : I was against the interlocutor which was pronounced in the former question, and I remain so. This is a question in a ranking ; but it is a personal debt, and precisely in the same situation as if it were an action of constitution. A great deal has been said here of *conflictus legum* : The law of England differs from ours in some points, and particularly in that of prescription ; but when we come to examine the matter, there is truly no *conflictus*, and the decision must be the same wherever the question be tried. If this be a subsisting debt, it must be so where-ever it be claimed. There are one or two propositions perfectly clear, which I shall state : 1. Where there are various obligants, or different subjects pledged, if the debt or lien be preserved good against one, it will be preserved good against the whole ; if it be kept alive it will be effectual against all : (stated a case from Stair, where two tenements were given in security, and action was brought against one only, the other being transmitted to a third party, yet this was sufficient to keep the debt alive). 2. This is an English Company, their *domicile* is in England : They are tied down by the act of parliament to England, and in the many actions that have been brought against them, they have been cited as an English Company. I therefore hold it to be clear, that the York-buildings Company are an English Company living in England, and, in so far as they exist, are in England at this moment. With regard to the constitution of an obligation, I am clear that the *lex contractus* regulates it, if it be good by that law, it must be good every where. The endurance of the obligation must be regulated by the *lex domicilii debitoris*, the place where he can be sued ; a person may have however a forum in a foreign country, from having effects situated in that country, but the real jurisdiction is that of the country where the debtor has his *domicile* ; the forum arising from the situation of the debtors effects, is merely accidental : if then England be the forum of the Company ; and if there the plea of prescription could not have been opposed to the demand of the creditor, I do not see how we can deny action here. Suppose we were to deny action here, on the ground that the action was cut off by negative prescription, I do not see what is to hinder these creditors from going to England and obtaining a decree of the Court there. Will your Lordships then say it is not a just debt because the action was

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II.

Judgement  
of the Court.  
Feb. 14, 1792.

“ The Lords having advised the mutual memorials for the  
“ parties in this cause, they repel the plea of the negative  
“ prescription of the law of Scotland, pleaded for the York-  
“ buildings Company to the bonds in question, and remit to  
“ the Lord Ordinary, &c.”

For the Company, Ja. Montgomery, }  
Creditors, All. Macnochie, } Advocates.

G. Johnston, C. S. }  
Jo. Taylor, C. S. } Agents.

Lord Monboddo Ordinary.

Colquhoun Clerk.

Vol. XI. No. 7.

III. WILLIAM SIMPSON, Esq; of Viewfield, Pursuer,

AGAINST

POOR ARCHIBALD BROWN, late Farmer at Carrington.

An adjudication being objected to, on this ground, that the decree of constitution, on which it had proceeded, did not refer to an attested account, which was the sole evidence of the debt, and that this account could not now be founded on, as it was prescribed, the objection was over-ruled.

## CASE

III

JOHN DICKSON having intromitted with the effects of William Brown, who died in Jamaica, he rendered an account of his intromissions to the defender Archibald Brown, and his brother Alexander Brown, to which there was subjoined the following docket.

|                  |                      |         |    |    |
|------------------|----------------------|---------|----|----|
| Hill-head, }     | To debtor, in above, | L. 6784 | 4  | 11 |
| 1st July 1765. } | To creditor,         | 3551    | 10 | 0  |

Balance in currency, L. 3232 14 11

Errors excepted.

(Signed) JOHN DICKSON.

In September 1778, Archibald Brown and his brother took a decree of constitution for L. 3000 Sterling, with interest from the 1st July 1765, the date of the attested account; but that account was neither referred to in the summons, nor produced to the judge; and on this constitution an adjudication of certain subjects belonging to Dickson was led in March 1780.

Wil.

William Simpson the pursuer had acquired right to an adjudication, affecting the same subject, of a prior date; but entitled only to a *pari passu* preference. In this situation, he brought a reduction of the adjudication led by the Browns, on these grounds: 1. That the writing founded on was improbativ, as wanting the writer's name and witnesses. 2. That the defender is barred from founding on the said account by the vicennial prescription, introduced by the act 1669. And it was also argued, that the claim was cut off by the English statute of limitations.

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1789.

In this action the Lord Ordinary pronounced the following judgment: " In respect the account bearing to be docketed " and signed by John Dickson, on the 1st July 1765, is not " founded on, nor mentioned in the decree of constitution in " the 1778, and was never produced, nor founded on till this " action was raised in the 1789, finds the same falls under " the vicennial prescription, and cannot in any view be found- " ed on to support the said decree of constitution and adjudi- " cation which followed thereupon; finds expences due, and " for extract, &c." Against this judgment, a petition was presented for Brown the defender.

Nov. 12, 1790.

In answer to the objection founded on the improbativ nature of the accounts and dockets, it was observed, that fitted accounts, letters, or obligations, *in re mercatoria*, do not fall under the act 1681. Besides, by the act 1669, subscriptions in account-books (within which description this docket falls) are to subsist in force for twenty years, Ersk. B. III. tit. 2. § 26.

Argument for Brown.

With regard to the English statute of limitations, it cannot apply: The parties in this transaction were two Scotsmen, whose engagements ought to be regulated by the law of this country; besides, there is an exception in the act, when the parties are beyond seas, and this law-term has been understood to apply to Scotland.

The principal objection, and the one upon which the Lord Ordinary has founded his judgement, rests in the act 1669. But, in the first place, the attested account bears date the 1st July 1765, and decree of the constitution was obtained in September 1778; so that there intervenes a period of only thirteen years, consequently if the decree applies to the account, it must still remain a probative deed.

The sum in the decree is L. 3000 Sterling, whilst that in the account is L. 3232 Jamaica currency; and although the value of the currency may have been over-rated, it was a mere mistake, proceeding from ignorance of the real value. But the defender has no objection to confine his demand to the

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the rate of Jamaica currency at that time, and that the Court shall restrict his adjudication to a security for that debt.

Now, notwithstanding this discrepancy, and although the account be not mentioned in the decree of constitution, there are several circumstances which point out this account to have been the warrant of the action. Thus, the action proceeds on a narrative of the facts which have been already stated, and that on or before the 1st July 1765, Dickson had received of Brown's effects the sum of L. 3000 Sterling, and he is decreed to make payment of that sum, with interest from that date; from which it appears, that the decree and account bears the strongest marks of connection with each other, and the period from which the interest is made to commence, is to be accounted for, only, from their having followed that rule of the law of Scotland, which allows of interest on an account from the date of the attestation.

It is therefore impossible to say that the debts is cut off by prescription, because there was a document taken upon it by a decree of this Court, before the years of prescription were expired. At the time of the decree being obtained there was confessedly complete legal evidence of the debt, and had the debtor appeared to oppose the action, the attested account would have been produced in evidence; and it is now impossible to reduce the decree, unless by showing that at the time of its being obtained, there was no debt due.

In another view, it would be no good objection to a decree of constitution, that it was taken for a random sum, as was determined in an uncollected case, *Sadler v. Devonshire* †.

Argument for  
Simpson, the  
pursuer.

The pursuer stated several circumstances, tending to show that there was no probability of Dickson's having ever received the money in question; and it was argued from the embarrassed situation of the defender's affairs, and Dickson's being solvent for the greater part of the time, that the defender must have received whatever balance was due. So far was the decree of constitution from tallying with the account, that the sums differed materially, and the decree mentioned that the sum "either had, or ought to have been recovered." An expression perfectly inconsistent with the terms of the account.

† *Sadler v. Devonshire and Reeve*, 1782. M'Neil of Tynish had been concerned as a partner with Sadler in a business carried on at St Christopher's: The amount of the sum due by M'Neil to Sadler on that concern it was impossible at that time precisely to ascertain; and therefore Sadler took his decree for L. 10,000, or what sum should be found justly due to him by M'Neil, on a fair count and reckoning. On this decree an adjudication was obtained; and in a competition betwixt Sadler and Devonshire and Reeve, adjudging creditors, the Court sustained Sadler's adjudication as a security for such sum as should ultimately be found due to him by M'Neil.

In support of the objection founded on the improbative nature of the docketed account, it was denied that this was a subscription in an account book, and Erskine's authority (B. III. tit. 2. § 26.) to which reference is made, is against the defender; for there is an exception of accounts, where the subject is not mercantile, which this is not.

The objection on which the Lord Ordinary has placed his judgement is, that the defender is barred from founding on the account, by the vicennial prescription. The act 1669 enacts, " That holograph writings and subscriptions in count-books, not being pursued for within twenty years, shall prescribe in all time thereafter, except the pursuer offer to prove, by the defender's oath, the verity of the said holograph writing and subscriptions in count-books." The account in question never was heard of for twenty-four years after its date, and prescription must therefore have taken place.

The defender founds upon the summons and decree of constitution in 1778, for taking off the effect of this plea; but it can have no such effect: the account was not produced in that action, nor was it in any shape referred to. So far from being pursued on, it appears that the person who conducted that process knew of no such account.

It has been said, that in several decrees of constitution, taken by the Creditors of the York-buildings Company, the bonds on which the pursuers founded were not produced, and yet they were sustained to interrupt prescription. In these cases, the bonds were not in this country, and the question was not about the vicennial prescription, but whether the debt itself was saved from the forty years prescription; and although the decree here may save this debt from the long prescription, if it can now be sufficiently instructed, yet it cannot save the alleged holograph docket from the vicennial prescription of the act 1669, as it was neither produced, nor in any shape founded on, in the action upon which the decree proceeded.

As to the case of *Sadler v. Devonshire and Reeves*, it does not seem to have any connection with this case; no question occurred there respecting the vicennial, or any other prescription.

Lord *Esqgrove*—observed, that this was a reduction of a decree of constitution, and of the adjudication following upon it, on this ground, that there was no debt. The answer which has been made is, that there is a debt; and in evidence of it there is produced an account attested by the debtor, acknowledging the debt. This is met by the plea of prescription; and the answer to that again is, that prescription had not run against the account at the time that the decree was obtained, and therefore the account must be held to be good evidence in support

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support of the decree. In the questions where the York-buildings Company were concerned, documents were in the same manner founded on, which were all prescribed at the time they were produced. The same answer was made which has been made in this case; and these documents were sustained by your Lordships as evidence that there was a subsisting debt at the time of obtaining the decree. His Lordship was for repelling the plea of prescription.

Judgement  
Feb. 18, 1791.

“ The Lords having advised this petition, with the answers thereto, they repel the plea of prescription stated against the account produced by the defender Archibald Brown, and remit to the Lord Ordinary, &c.”

Against this judgement, a reclaiming petition was presented for Simpson; where, in addition to the former argument, he founded on the following cases, as tending to show, that the Court have always required the particular document of debt to be founded on, that was intended to be preserved from prescription. *Kennoway v. Crawford*, 11th February 1681, collected by Lord Stair.—*Harcarse, voce Prescription*, No. 767.—*Blair v. Sutherland*, 9th December 1735, observed by Clerk Home. It was said, that, on the same principle, citations upon blank summonses, when such summonses were in use, or before the Court of Admiralty, where they are still used, have no effect to interrupt prescription; *Fac. Col. Gordon v. Bogle*, June 23, 1784. Reference was also made to the act of parliament 1696, c. 19. which requires summonses, intended to interrupt prescription, to contain all the grounds and warrants upon which the summons proceeds. On advising this petition, without answers, their Lordships “ refused the desire thereof, and adhered to the interlocutor reclaimed against.”

March 8, 1791.

For the Pursuers, Ad. Rolland, and  
Mat. Ross,  
Defender, James Clerk,

} Advocates.

Lord Swinton Ordinary.

Ja. Stormonth,  
W. M'Pherson,

} Agents.

Sinclair Clerk.

Vol. I. No. 4.

## PRESUMPTION.

I. The Trustee for the Creditors of JAMES and PATRICK HUNTERS and Company, Merchants in Greenock,

AGAINST

The Trustee for the Creditors of WILLIAM HAMILTON and Company, Merchants in Greenock.

Goods being intended as a remittance to a mercantile house here in payment of a debt due by a foreign merchant, and the house, with a view to the assumption of new partners, having directed the goods to be consigned to them under the new firm : But the old Company being resumed before the arrival of the goods, and they getting possession of them, were preferred to the arresting creditors of the foreign merchant.

WILLIAM HAMILTON and Company, merchants in Greenock, entered into an agreement with Robert Donald and Company, merchants in Virginia, by which they were to supply them with goods, and to receive remittances in the produce of that country. Donald and Company were bound to make "regular remittances for the usual periods of credit of twelve and fifteen months; and failing these, at any time, the common interest was to be allowed to Hamilton and Company on any advance they should be in, for sums short remitted." Hamilton and Company had also a certain commission on the transactions.

In consequence of this agreement, William Hamilton and Company remitted to Donald and Company, goods to the value of L. 6923 Sterling. On the 23d September, Donald and Company wrote thus : "The intent of this is to inform you, that our ship Katty, Captain Moses Crawford, is now loading with tobacco, and will sail in a fortnight: She will have on board 100 hds. of tobacco, and 40 m. slaves: We are convinced we will be losers by this shipment; but we will run every risk to make you a remittance, and there are no bills to be had here."

About this time, a proposal was made to have taken in four new partners into the house of William Hamilton and Company, and to have changed the firm to Hamilton, Garden, and Company; and accordingly the following letter was written to Donald and Company : "Our partner, Mr. William

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Aug. 1784,

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" liam Hamilton having informed you of the establishment  
 " which has been lately formed under our firm, with the de-  
 " sign of carrying on business here upon a liberal plan, with  
 " conveniency to ourselves, and to render every advantage and  
 " facility to the business of our friends; we beg leave, therefore,  
 " to introduce ourselves to your correspondence, and to assure  
 " you, that our best endeavours shall be used in order to render  
 " you entire satisfaction in every transaction you may intrust  
 " to us: And, from the long experience of our Mr. Wil-  
 " liam Hamilton, in every branch of the tobacco trade, and  
 " from his perfect knowledge of that article, we shall have it  
 " in our power to turn any consignment you may favour us  
 " with to the most beneficial account. (Signed) Hamilton, Gar-  
 " den, and Company." From this time, down to November  
 1784, several letters were written to Donald and Company, un-  
 der the same firm. It was, however, asserted by Hamilton and  
 Company, that the intended connection never had taken place,  
 and that no books were opened in the name of the new Com-  
 pany. A letter from the gentlemen, who were to have been  
 assumed as partners, after stating objections to the connection,  
 concludes thus: " We find therefore, though with much re-  
 " gret on our part, that we must relinquish the prospect of  
 " doing business together, as it would not, under these cir-  
 " cumstances, be convenient for either party." The letter is  
 dated 11th December 1784.

Donald and Company, who had received the information  
 of the new concern, before the vessel above-mentioned was  
 ready to sail, wrote to the new Company in the follow-  
 ing terms, 30th October 1784: " In conformity to my letter  
 " of the 1st instant, from Rapahanock, addressed to Messrs  
 " William Hamilton and Company, I now inclose invoice  
 " and bill of loading for 100 hhds. besides staves and planks,  
 " to your address, by Katty, Captain Crawford."—The invoice  
 bears, that the goods were " consigned to Messrs. Hamilton,  
 " Garden, and Company, for sales and returns." Several  
 other letters were written by Donald and Company, pro-  
 mising further remittances, to account of their debt to Ha-  
 milton and Company; and, on the 31st December 1784,  
 Hamilton and Company wrote Donald and Company of the  
 safe arrival of the Katty, and of their having received an order  
 for the sale of the vessel; the same letter informs Donald and  
 Company, that the new concern was given up, and desired them  
 to address to William Hamilton and Company, as formerly.  
 On the 24th April 1785, Donald and Company wrote William  
 Hamilton and Company, in which they say, " we are glad of  
 " the Katty's arrival, &c. we are satisfied the best you can  
 " has been done for us, &c."

On the arrival of the Katty at Greenock, which happened  
 in

in January 1785, William Hamilton and Company took the charge of her. They disposed of the cargo, and offered the vessel for sale, but she did not sell, and the affairs of James and Patrick Hunter having gone into disorder, a sequestration was awarded, a trustee appointed, and an action was raised by the Trustee against Donald and Company. The ship was then arrested, and arrestments were also used in the hands of William Hamilton and Company. These arrestments were loosed on caution, and the vessel was afterwards sold for L. 250, in Havre de Grace, and the price remitted to Hamilton and Company.

In this situation of matters, the question came to be, whether the goods, remitted as above-mentioned by Donald and Company, amounting to L. 1494 Sterling, and the value of the vessel, was the property of Hamilton and Company, in virtue of the consignment; or the property of the arresters. Lord Monboddo, before whom the question came, pronounced this judgement: "Finds, 1. That William Hamilton and Com-  
 " pany, and Hamilton, Garden, and Company, are two di-  
 " stinct companies; and that the existence of Hamilton, Gar-  
 " den, and Company is clearly proved by the letters in process:  
 " 2. That the ship Katty, and her cargo, being consigned to Ha-  
 " milton, Garden, and Company, was improperly seized and  
 " delivered by William Hamilton and Company, and that  
 " therefore the ship and cargo were very properly arrested in  
 " their hands by the trustee for Hunters and Company; and  
 " therefore finds, that the arresters are preferable to any claim  
 " that William Hamilton and Company can have upon the pro-  
 " ceeds of the ship and cargo in their hands."

Mar. 11, 1790.

This judgement was brought under review by the Trustee for the Creditors of William Hamilton and Company by petition.

There was no co-partnery entered into with these gentlemen who were to have been assumed into the house of William Hamilton and Company, and who meant to have carried on business under the firm of Hamilton, Garden, and Company. At any rate, it was dissolved on the 11th December, some weeks before the arrival of the vessel, so that at the time of her arrival at Greenock there was no Company under that firm to which she was addressed; and William Hamilton and Company, for whose payment the remittance was intended, and who consequently were the constituents of Hamilton, Garden, and Company, had they been at this time in existence, were alone entitled to take the charge of the vessel and her cargo. Independent of the plea of retention, competent to a *bona fide* possessor, it is indisputable, that a merchant in this country, to whom a remittance is made by a foreign merchant, whether

Argument for  
the consignees.

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in money, in bills, or in goods, for the purpose of extinguishing a debt already contracted, is entitled to apply the remittance accordingly; nor can any other creditor carry it out of his possession, or lay hold of the remittance by diligence. In support of this, one or two instances shall be taken notice of.

Hastie and Jamieson merchants in Glasgow, had, in the year 1764, entered into a contract with Archibald Dunlop merchant in Virginia, by which they were to send him goods to America, being allowed a commission for their trouble; and he, on the other hand, became bound to consign them such tobacco as he had occasion to send from Virginia, the proceeds to be applied to Dunlop's credit, after allowing a commission to Hastie and Jamieson, on the sales. In 1765, tobacco and other goods, were shipped by Dunlop, admitted to be his goods, and shipped on his own account and risk, to be delivered to Hastie and Jamieson, or their assigns, he or they paying freight. The ship arrived in the Clyde on the 25th August, and the bills of loading were forwarded to Glasgow, and delivered to Hastie and Jamieson, on the morning of the 26th; on the same day, a few hours after the delivery of the bills of loading, Robert Arthur, a creditor of Dunlop, arrested the ship and cargo as the property of Dunlop. With respect to the ship, his arrestment was good; but it was maintained by Hastie and Jamieson, that the property in the cargo was transferred to them by the bills of loading being in their possession some hours before the arrestment was used. In this cause the practice of the merchants in Holland, Britain, and America, was founded on by Hastie and Jamieson, from which it appeared, "that the consignments and bills of loading, are universally considered to be so absolute and irrevocable an assignment of the cargo, that before the goods come to hand, they may be disposed of, and the bills of loading indorsed, which, in the practice of merchants, is an effectual transfer of the property." The Lord Ordinary found, that there was not sufficient evidence that Dunlop was divested of the property in favour of Hastie, Jamieson, and Company; and consequently that the same was liable to be affected by the diligence of his creditors, his Lordship therefore preferred Aitken on the arrestment. But the cause being appealed, the House of Peers, ordered the judgement to be reversed, so far as it related to the cargo; and it was declared, that the appellants had a special property therein, preferable to the arrestments.

June 29, 1768.  
April 1770.

But, in the second place, although Hamilton, Garden, and Company, had been a subsisting house when the vessel arrived it could have made no change on the merits of the case; for the proceeds must have been paid to the petitioner, for whom they were destined as a remittance, as appears from the correspondence of Donald and Company.

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The petitioners have no occasion to dispute, that when a person puts money into the hands of another, or indorses bills with instructions to apply the proceeds to any particular purpose, that these funds may be arrested; for there is no *jus questum* in any third person. The order might even be recalled: But here the remittance was made in terms of express agreements; and the consignment to Hamilton, Garden, and Company, was no more than following the original intention of consigning to William Hamilton and Company, in part of the debt due to that Company. The following case is applicable to the present: David M'Farlane merchant in St. Christophers, consigned to James King, Port Glasgow, a parcel of sugars, and King had instructions to apply the proceeds towards payment of M'Farlane's creditors, as contained in a list. Other creditors, whose names were not in that list, used arrestments in the hands of the shipmaster, and in King's hands, which gave occasion to a multiple-poining. The Court found, that the goods could not be habily arrested, in prejudice of those for whom King held the consignment, and the creditors in the list were preferred to the arresters.

Supposing therefore the Company of Hamilton, Garden, and Company to have been in existence when the ship arrived, no arrestment in their hands could have hurt the right of William Hamilton and Company: therefore, by the dissolution of that concern, Hamilton and Company virtually and necessarily came into their place as to this consignment; and the effects having accordingly come into their hands, cannot be carried off by arrestment.

With regard to the property of the ship, the petitioners can see no ground for any distinction; it was sent to them with full authority to dispose of it, and to apply the price in extinction of their debt; the ship was therefore, at the time of the arrestment in the harbour of Greenock, equally the property of the petitioners as the cargo.

Where goods are consigned, from a debtor abroad, to his creditor in this country, in payment of a debt, the creditor's right rests upon two points: 1<sup>st</sup>, The fact of possession. 2<sup>dly</sup>, Its being a lawful possession derived from the will and deed of the owner himself. But in the present case, in regard to the ship, there was neither remittance, nor possession of any kind, lawful or unlawful; and with respect to the cargo, although there was possession, it was irregularly obtained.

Argument for  
the arresters.

The cargo was consigned to Hamilton, Garden, and Company, and had they, as they ought, taken possession of the cargo on its arrival, they could neither have pled retention nor compensation, as Donald and Company were not owing them a shilling. If these consignees did not chuse to exercise  
their

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their right, that circumstance could confer no property on William Hamilton and Company; and the possession taken without any authority, or at least upon conjecture, is very different from the right of proper consignees.

When the consignees declined to interfere, no one creditor had a better title than another to take possession without the forms of law; and a creditor who enters into possession without a good title is liable to have the goods arrested in his hands, and must make them forthcoming.

A lawful possession is necessary to found the plea of retention; and it is not every possession that will afford a preference in a question with an arrester. Thus, a debtor perceiving his affairs to be in disorder, put the keys of his house, with an inventory of the furniture, into the hands of one of his creditors; the depository put these goods into the hands of a third person, to whom he was indebted, and they were then arrested by creditors of the original proprietor; one of the arrestments was used in the hands of the first depository, the other in the hands of the person who actually had the goods in his possession: The Court preferred the arresting creditors to the depository, and the arrestments according to their dates; 3d volume of the Dict. 87th page, and Fal. Col. 10th December 1760, Creditors of Appine. And in the case lately decided by the Court, (See Retention Case of this Collection), it was established, that even where possession is lawful, it is only in some peculiar circumstances that retention is pleadable.

The petitioners say, that Donald and Company had once intended to consign the goods to them; but this is of no moment, as that intention was altered: nor could the intended application of the price of the goods change the property of them, which remained with Donald and Company, and was arrestable by their creditors.

Hastie and Jamieson's case has been referred to, but that was determined upon the right which the consignees had, through the indorsation of the bills of loading; and here the bill of loading was indorsed, not to Hamilton and Company, but to Hamilton, Garden, and Company: the only part therefore of the decision, which bears upon the present, is that respecting the ship, which was found to be carried by the arresting creditors; a point favourable not only in the present branch of the argument, but in that which relates to the right to the vessel.

The petitioners, in the second place, contend, that although Hamilton, Garden, and Company, had taken possession, the petitioners would have been preferable to any creditors arresting in their hands. The petitioners here suppose, in point of fact, that Hamilton, Garden, and Company, had orders to apply the proceeds in payment of the debt due to the petitioners: But it is clear that there were no such orders. It may be true,

true; that it was the original intention of Donald and Company, when they meant to consign the goods to Hamilton and Company, that the proceeds should be applied for their own payment: But when they changed the consignees, they gave no orders for applying the proceeds in that way. And therefore mere intention, though ever so certain, can operate nothing; unless it be declared and executed in proper form.

But even had the intention appeared from the letters of Donald and Company, this resolution of the owners could not have altered the property; and these goods must have been arrestable by their creditors. The case of King is no where collected; probably the list contained the whole creditors, and in that case it was very favourable for the creditors who were urging a rateable distribution, in opposition to arresting creditors endeavouring to acquire a preference.

Lord *Monboddo*.—The new Company acted as a Company; letters were addressed to them, and they solicited the American merchants for employment. The bills of lading were taken to this new Company; at the same time it was undoubtedly the intention of Donald and Company to have sent this cargo to the old Company, to be applied in payment of the balance due to them; and if there had been any order on the new Company (the real consignees), to sell the goods, and pay the old Company, and the goods had afterwards come into the hands of the old Company, I think they would have acquired a good right to them. But this was not the case: the new Company was given up, and the old Company resumed before the ship arrived. It was in this situation that the old Company got possession of the goods; and I would ask, whether retention be competent on this possession?

Lord *Justice Clerk*.—The Lord Ordinary's judgement is full and distinct. Robert Donald and Company were merchants in Virginia, William Hamilton and Company were connected with them in trade, goods were to be sent to Virginia, and the Company here were to be reimbursed by remittances from Donald and Company. In the course of this trade, Donald and Company became considerably indebted to Hamilton and Company, and, in discharge of this debt, they were preparing a cargo to be sent to Greenock, to that Company, the proceeds to be applied to their use, the Katty was loaded for this very purpose, when Donald and Company received the letters mentioning their having assumed new partners, and that they were to use a new firm, this vessel was therefore consigned to this new firm, but still for the purpose of paying off the debt to Hamilton and Company. It does not, in my apprehension, at all affect this question, whether the new Company

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pany ever existed, or ever acted : My view of the matter is this, *ex figura verborum*, the consignment was to the new Company ; but the purpose of the consignment was not altered, nor could it have been altered consistently with justice. Donald and Company accordingly, in their letters to Hamilton and Company, so far from considering this consignment to Hamilton, Garden, and Company, as an alteration, expressly say, that they are to make a further remittance, in order to pay up the balance fully. The only meaning of this is, that at the desire of William Hamilton and Company there is a change in the consignment, but the purpose remains the same : it is a remittance to the new Company, for behoof of the old one ; and the new Company, had they existed, must have held them for their behoof. In these circumstances, Hamilton and Company take possession of the goods on their arrival in this country : Now it is clear, if goods are sent to a person, for behoof of another, the consignee is the factor, and it is in the option of the principal to take the charge of the goods upon himself, without the intervention of a factor ; for he has the real right in him.

Lord *Eskgrove*.—I have no doubt, that when a consignment is made by a foreign merchant, his original intention with regard to that consignment may be varied according to his own pleasure. He may alter his intention, and send the goods to what house he thinks proper : But when there is an express obligation to send the goods to a particular house, as in this case, he is not at liberty to alter the destination, and to consign them to another. This was Jamieson's case ; and it was found there that the consignee could not alter the destination. The facts here are, that in the course of trade, a debt has been incurred to Hamilton and Company ; a ship is loaded for the purpose of discharging that debt, before the ship sails there is an alteration in the firm of the Company to whom the ship was to have been consigned : This is not properly a new Company, it is only the assumption of two partners. That Donald and Company did not understand that there was any alteration of the original intention is evident from their letters : Frazer writes thus to Hamilton, Garden, and Company, “ in conformity to my letter of the 1st instant, I now “ inclose invoice and bill of loading, &c.” That is, in consequence of our previous agreement with Hamilton and Company, we send a cargo on their account ; for the letter of the 1st, informed Hamilton that the goods in question were to be shipped for them. This shows then, that there was no change in the views of Donald and Company ; and Donald the other partner writes, “ Bell shall be loaded as soon as Ramsay is “ gone, and you shall have a full and complete remittance by

by him ;" these are observations which show that it was the meaning of Donald and Company, to follow out their original intention, and fulfil their agreement. Suppose there had been a new company, and that Donald and Company had consigned a cargo to them for behoof of their assignees, Hamilton and Company ; the assignees would have been preferable to the arresting creditors : But this case is stronger where the original intention was to have consigned the goods to Hamilton and Company. Donald and Company have confirmed their right to them.

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The Lord *President* professed himself to be of the same opinion.

Lord *Eskgrove*.—In *Hastie and Jamieson's* case, the cargo belonged to them in consequence of the consignment and previous contract ; but the ship not being sold, belonged to the original owner, liable to the diligence of the law.

The Court altered the judgement of the Lord Ordinary ; found William Hamilton and Company intitled to the cargo ; the arresters to the value of the ship ; and remitted to the Lord Ordinary to ascertain the value. Judgement.  
May 27, 1791.

|                                 |              |                     |           |
|---------------------------------|--------------|---------------------|-----------|
| For the Assignees, Alex. Wight, | } Advocates. | Andrew Blane, C. S. | } Agents. |
| Arresters, Mat. Ross,           |              | Robert Syme, C. S.  |           |

Lord Menzies Ordinary.

Sinclair Clerk.

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## PROVISIONS TO CHILDREN, &c.

**MARIANE and GEORGINA M'KAYS, Daughters of the late  
Lord Reay, Pursuers.**

A G A I N S T

**HUGH LORD REAY, and his Factor *loco tutoris*, Defender.**

A provision to a daughter being made payable the first half at her majority or marriage, the second at the death of her father, the daughter having survived her father, but dying unmarried, and before arriving at majority, the provision was found to vest in her.

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THE late Lord Reay, in his contract of marriage, on the failure of heirs-male of that marriage, and in the event of the estate's going to a collateral heir-male, bound the heir and the estate itself in the following provisions to his daughters: if one daughter, 25,000 merks; if two daughters, 30,000 merks; and if three or more daughters, 36,000 merks; to be divided as he should appoint, and failing of such appointment, equally amongst them, with the exception of 2000 merks additional to the eldest. Then follows a similar provision in favour of younger children, whether male or female; and the daughters provisions are by another clause made payable, "the one half thereof at their respective majorities or lawful marriage, whichever shall first happen, and the other half of the said provisions at the first term of Whitsunday or Martinmas next after his death (that is, Lord Reay's), and with lawful interest of their respective provisions from and after their attaining to the age of twenty-one, or being lawfully married." And by an after clause his Lordship becomes bound "to cloath, educate, and entertain his daughters until the said provisions become due." On the dissolution of the marriage by the death of Lord Reay, there was no heir-male: But there were three daughters, Jean, Mariane, and Georgina; Jean the eldest died in April 1773 unmarried, and before having attained the years of majority: His Lordship had made no distribution of the sum provided to daughters.

It being questioned by the Managers of the present Lord Reay, (who succeeded to the estate as heir-male, and was liable for

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for the provisions,) whether, in consequence of Jean's dying unmarried, and before her arrival at majority, her provision had vested so as to descend to her heirs. An action for deciding this point was brought at the instance of Mariane and Georgina M'Kay, both of whom were major: They concluded as in their own right, and in right of their deceased father for 36,000 merks. This action Feb. 18, 1790. came before Lord Dreghorn Ordinary, who pronounced the following judgment: " Finds, that the contract of marriage " is not accurately framed; and that from the clause respecting the aliment, it should seem the writer supposed (contrary to all probability), that Lord Reay would live till all his daughters were married, or major: But finds, that by the express terms of the contract, one moiety of the provision is payable at the first term after his Lordship's death, and could then have been exacted, the accidental circumstance of Jean's moiety not having been actually paid, ought to make no variation in her right; and that so far the case is clear: Finds, as to the other moiety, that the extent of the sum total payable to the daughters depended on the number existing at the dissolution of the marriage by the death of Lord Reay; and as three existed when that event happened, that the sum was 36,000 merks: Finds, that a provision payable to a child, on the attainment of majority or marriage, does, in the general, lapse on the predecease; and that the decision in the case of the executors of Arthur Burnet v. Sir William Forbes, referred to by the respondent, does not prove the contrary, the dispute there being as to a legacy; and a legacy stands on a very different footing as to this matter, from a provision to a child, as was admitted in the argument in that case for the executor: But finds the general rule ought not to be applied to this case; because, in the first place, the provisions are payable to the daughters on their being excluded from their father's estate, by a collateral heir-male, and consequently it must be presumed, that if the question had been put to Lord Reay, whether he inclined that the share of a daughter predeceasing should benefit his collateral heir-male, or his own surviving daughters? he would have answered in favour of the latter; 2dly, But to distinguish between the one moiety and the other, and make the term of payment of one of the moieties operate as a condition, would be to make the *clause of payment* imply a will directly repugnant to that expressly declared in *the clause of constitution*; because, altho' the adoption of the distinction would in the case that has happened have the effect of giving the respondents, the two daughters who survived the term of payment, 30,000 merks, which is the sum provided by the clause of constitution, in

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“ the case of two daughters existing at the dissolution of the  
 “ marriage by Lord Reay’s death, consequently they mutually  
 “ would suffer no prejudice by having had a third sister; yet  
 “ they would draw 24,000 merks only in their own right, by  
 “ virtue of that clause, which is 6000 merks less than it pro-  
 “ vides for two daughters so existing, and in every other case  
 “ of a number of daughters existing at the dissolution of the  
 “ marriage, and one or more than two surviving the term of  
 “ payment, the one, or greater number than two, would  
 “ draw less than is provided by the said clause. On these  
 “ grounds, of new, repels the defence; refuses the represen-  
 “ tation; and adheres to the former interlocutor.

This judgement was brought under review by the defend-  
 der.

Argument for  
 the pursuers.

There are two questions: I. Whether the one half of the provision, payable to the deceased Jean M’Kay, the eldest daughter, at the first term after the death of her father, did, or did not vest in her, so as to be transmissible to her nearest of kin. II. Whether the other half of the said provision, payable upon the marriage or majority of the said Jean M’Kay, was or was not vested in her at the time of her death.

I. Upon the first point, it is no doubt true, that the words of the contract bear, “ that the one half of the provision shall  
 “ be payable at the first Whitsunday or Martinmas next  
 “ after the death of Lord Reay.” But this proceeded on the supposition that Lord Reay’s death was to happen after the marriage or majority of his daughters. And as the one half of the provision was made payable at marriage or majority, and the other at the first term after Lord Reay’s death, the condition seems to have been inserted in favour of Lord Reay, to whom it might have been inconvenient to pay up the whole provision during his lifetime: Therefore, even taking the words as they stand, they do not import, that upon Lord Reay’s death, before the marriage or majority of his daughters, one half of the provision should become due. Had the case been put to Lord Reay, that he might leave three daughters in infancy, and that one of them might die in a week or a month after himself, he certainly would have said, that no part of the provision ought to vest in the daughter dying during her infancy.

And here the petitioners must observe, that the provisions in the contract, are not settled upon the daughters and their heirs and assignees, they are given to them for their support and maintenance only. This is a natural obligation; but *debitor non presumitur donare*, and the Court will not strain the words, to make them infer an obligation beyond the meaning of the parties. Lord Reay was bound to settle reasonable pro-  
 visions

visions upon his daughters; but, in the event of their dying during their infancy, he was not called upon to load the heir of the family with a burden in favour of their executors. This action has been brought by the daughters of Lord Reay, but had they unfortunately died, the same argument might have been used by their executors, and the estate burdened with a large sum in favour of distant relations of the family, contrary to the fair import of the obligation in the contract of marriage.

II. It has been hitherto understood, that *dies incertus pro conditione habetur*. No event could be more uncertain, than that daughters not yet born, should attain the years of majority or be married, but till either the one event or the other happened, they could have no claim under the contract, not even for the interest; and accordingly Lord Reay was bound to aliment them till they came of age.

So far as respects the intention of the parties, it is certain that Lord Reay did not mean to burden the representative of the family with provisions to the executors of such of his daughters as should die in infancy. But independently of this, as Jean M'Kay died unmarried, and before attaining majority, her provision did not vest so as to transmit to her executors. Here the general rule holds, and *dies nec cedit nec venit*, till the event happens; Voet, Lib. 36. t. 2. § 2.

The general rule then is, that *dies incertus in testamento conditionem facit*; and accordingly a legacy given to a person, upon his attaining a certain age, must fall if he dies before attaining that age.

The Court has proceeded upon these principles in deciding a variety of cases; as in the noted case, Bell v. Mason, 1st February 1749. The circumstances were: Mason's daughter was married to Young, she predeceased her husband, leaving a son of the marriage. The child went to reside with Mason the grandfather, who engaged to maintain him till he should arrive at the age of sixteen; and he bound himself to pay to this grandson "at the term of Whitsunday 1747, which will be the first term after his attaining the age" "aforesaid the sum of 600 merks," with penalty and annualrent after the term of payment. The child died before the term, and an action was brought by the nearest of kin for payment of the 600 merks. The defence was, that this being a gratuity, settled by the defender upon his grandchild, as a provision, when he should arrive at the age of sixteen, the term of payment is that very day when the child has completed the age of sixteen: But that this term never did exist, and therefore as a sum cannot be demanded before the term of payment, the sum in question never can be demanded. Lord Elchies, the Ordinary,

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dinary, at first repelled the defence: But the Court afterwards unanimously altered, and sustained the defence.

Independently of the argument upon the general question, it has hitherto been understood, as a settled point in the law of Scotland, that a provision by a father to his child, payable at a certain age is not due if the child die before attaining that age. Stair, B. 1. tit. 3. § 7. and tit. 1 § 2. Erskine, B. 3. tit. 1. § 7.

Accordingly, provisions to children, payable on their arrival at a certain age, have been found ineffectual, if the children do not live to the age required, Dictionary, Implied Condition. — Thus, provisions in a marriage contract being made payable to the male children, on their arrival at the age of twenty-one, and to the females at eighteen; and the children dying before the terms of payment, it was found that neither their executors, assignees, nor creditors, had any right to the provisions, they being payable at an uncertain day, and not conceived to heirs or assignees; Stair, 17th January, Gilmour; July 1665, Edgar. Elliot granted a bond of provision to his second son and daughter, payable to them, their heirs, and executors, at the next term after the granter's decease; it was also provided by a distinct clause, that notwithstanding the payment was provided to be at his death, yet the money should not be payable by his heir, till the younger children respectively attained the age of sixteen years, under which condition these presents are granted, and no otherwise. The Lords found, that the clause imported a condition, being *inter liberos*, and was not *prorogatio termini solutionis*, and that the same did not belong to their executors, unless the children attained to sixteen years, though here there was no return or substitution mentioned. Marcus, (Bonds), July 1687, Moir.

But it has been said, that all these authorities were overruled in the case of Burnet v. Forbes: that case however differed from the present; it was there admitted (and the Lord Ordinary takes notice of it), that a legacy stands upon a different footing from a provision to a child. Where a person gives a sum *extra familiam*, by a legacy, there is no reason why the common rule of law should not take place. Where he gives a provision to a child, it is not to be presumed that he would give to that child the power of putting the money *extra familiam*; and if it were to be disposed of *intra familiam*, it is more reasonable that it should be at the disposal of the father than of the child. This decision cannot therefore, in this case, be made a precedent.

Argument for  
the defender.

The plea maintained by the pursuers rests on this simple footing, that as their sister Jean survived their father, who had made no destination of the 36,000 merks, the full right to an equal

equal share of that sum, was, from that moment, vested in her, although the term of payment, with respect to one half thereof, was suspended to a more distant period, for the conveniency of the debtor.

I. With regard to the one half payable at the first term after the death of Lord Reay, there is no room for a question; for as Jean survived her father several years, the right not only vested, but one half was actually payable, and might have been demanded. Had this half been paid to her, it could not, in the event of her death have been called back by the defender; his argument therefore comes to this, that by the delay of paying a just debt, he has operated a discharge to himself, and consequently a forfeiture of the rights of the creditor's representative.

But it has been said by the defender, that one half of the provision was to become due at the death of Lord Reay, only in the event that his death happened after the majority or marriage of his daughter. On looking to the clause, there is no ground for this distinction, one half of the provision is payable at the respective majorities or marriages of the defenders, and the other at the first term after the death of Lord Reay. This last term is simple, and unconditional without distinguishing at what time his Lordship should happen to die.

The defender supposes, that had the event which has happened been foreseen, it would have been expressly provided by the contract, that the share of the daughter deceasing should become extinct. But the pursuers maintain the contrary, and that the parties would have declared it to be their intention, that the heir-male should take the estate, burdened in a particular manner, according to the state of the family at the time the succession opened to him, and that he was not to be affected by any subsequent event.

The not mentioning heirs and assignees, in the contract of marriage, is not material, as the rule is, that a *jus crediti* vested in any person, transmits to his heir; and when the contrary is intended, there must be an express exclusion of heirs and assignees.

II. Upon the second branch, respecting that moiety of the provision payable at the respective majorities, or marriages of the daughters, the defender has quoted a number of authorities to prove, that where a legacy is left in a bond of provision, granted to a child, payable at his attaining a certain age, such legacy or provision, is understood to lapse by the child's dying before attaining that age, according to the maxim, that *dies incertus pro conditione habetur*.

These authorities the pursuers do not think it necessary to discuss, as the whole were fully before the Court, in the question

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tion betwixt the Executors of Burnet, and Sir William Forbes, decided 9th November 1783, where the Court found, that a condition of this kind did not affect the constitution of the legacy, but only suspended the payment thereof.

As to bonds of provision in favour of children, the defender's quotations are applicable solely to voluntary provisions by a father or grandfather, which are strictly interpreted; so as not to create a burden on his estate, beyond what it was certain he meant to create; and, even in that case, the decisions of the Court have not been uniform. But this question relates to an obligation in a contract of marriage, the most honourous of all contracts, and must therefore depend on the construction of those clauses by which the obligation is constituted.

From the clauses in the contract of marriage, it appears, that the obligation in favour of the pursuers is qualified by one express condition, and by that alone; namely, that there should be no heirs-male of the marriage, and that the other heirs-male of the family of Reay should succeed: which condition has existed; and accordingly the obligation on the defender is absolute, without any condition expressed or implied. The terms of payment are constituted by a separate clause, which no way affects the constitution of the provision, but only the time of its being demanded.

By the manner in which the obligation is conceived, the *quantum* of the sum provided to the daughters, is made to depend on the number at some one period. In order, therefore, to judge of the import of the obligation, it is only necessary to know at what precise period the number of daughters was to be taken; and the pursuers submit, that the period was the dissolution of the marriage without heirs-male, and the estate passing to a collateral heir-male; it being declared, that one or other of the above sums, depending on the number of daughters existing at that time, was thenceforth to be a burden on the heir-male, and on the estate itself.

In judging of a mutual contract, the Court will consider, not merely the intention of Lord Reay, but likewise the intention of the father and friends of the Lady with whom he was contracting; and there can be no doubt, that both parties, in the event, which has happened, of the estate's going to a collateral heir, and of one of the daughters dying before marriage, or majority, would have inclined that the 36,000 merks should remain *intra familiam*, and go to the surviving daughters; nor is it possible to imagine that the parties did mean one half of the provision in question to devolve on the heir-male, and the other half only to go to the surviving daughters.

One



One circumstance which must convince the Court, that what the defender contends for could not be in the view of the parties is, that by holding Jean's share as lapsed, the pursuers must be reduced to 24,000 merks in place of 30,000, which was the provision for two daughters. A case even stronger may be figured; suppose both the eldest and second daughter to have died, and their provisions to have gone to the heirs-male, the survivor would be reduced to her share of 12,000 merks, though the provision of one daughter is 25,000 merks: and what is strongest of all, had Lord Reay exercised his power of division, by allotting the whole or greater part to one daughter, and the share of such daughter to be held to accrue to the heir-male, it might have happened that the surviving daughters would have been entirely excluded, or nearly so.

These consequences show, that the defender's plea cannot be agreeable to the sound construction of the contract, nor to the meaning of the parties.

Lord Swinton.—The provision is absolute and pure. The term of payment is in a different clause. The Opinions.

Lord Justice Clerk.—When a provision is payable at a certain age, there is an implied condition that the child shall arrive at that age. If he does not, the provision does not take effect, *dies nec cedit nec venit*. There is no difference betwixt a bond of provision, and a marriage-contract. The donor considers the time when the provision will be needed; if the child never arrive at that age, the presumption is, that the donor does not mean to give the provision at all. If a provision be made payable at Martinmas 1795, *dies cedit etsi nondum venerit*, a provision in these terms vests immediately, and will be transmitted to the heirs of the disponees, in the event of his death; in this case there can be no doubt that the term will arrive. But the child's attaining a certain age, is not a necessary event; and if he die, the provision never can be purified. I am clear, on this general question, from the words of the settlement, as well as from the reason of the thing. The only point is therefore *quando dies cedit* in the present case: It is natural to suppose, that as one half of the provisions was made payable at Lord Reay's death, and as that event has happened, one half must now be due: But attend to the words of the clause, the first moiety is made payable at majority or marriage, the second at the father's death; and taking the whole deed together, the natural construction seems to be, that the children have no title to any part of the provision, until their marriage, or arrival at majority. It is from the terms of majority or marriage, that interest is due, and from these the provision vests. The father's death only gives a delay, consequently, if the children die unmarried, and before their arrival at majority, no part of

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the provision vests, if they survive them, the whole provision bears interest, the whole is to be considered as then due, and must of course transmit to the heirs of the child dying after either of these periods. It is said in the papers, that the existence of Jean bears hard on the surviving daughters, for had she never existed, they would have enjoyed betwixt them 30,000 merks; whereas by the plea of the heir-male they will be restricted to 24,000 merks. But this proceeds on a mistaken opinion; for the daughter who died unmarried and before majority, must be considered as never having existed, and the provision of the surviving daughters, must be extended to the full sum allotted in the event of there being only two.

Lord *Fiskgrove*.—The father must have considered his death, as settling the provision. He has made provision for three children; what would have been the effect of exercising the reserved power? Suppose he had set a-part the sum provided for three daughters, there could have been no doubt that there *dies cedit*; the same conclusion follows, though no division was made at the death of the father, *dies cedit*. I do not give the same interpretation to the clause which has been given by the Lord Justice Clerk. I think that one half was meant to be payable at the term which should first arrive, and therefore that one half at least was due at the father's death. The second term is only a delay, *dies cedit sed nondum venerit*. There has been an argument drawn from the term at which interest was payable, but here there was a substitute for the interest; there was the aliment, and it was of more value, than the mere interest: *dies cedit* on the arrival of majority, or in the event of marriage, during the father's lifetime; or before these terms, in the case of the father's death; from the moment that any one of these three events takes place, the whole transmits.

Lord *Henderland*.—The law was properly laid down by the Lord Justice Clerk, *dies incertus pro conditione habetur*. But what is the *dies incertus* in the present case? There are two; the first *dies incertus* is the majority or marriage. It is true, the obligation to aliment is equal to interest; but this does not enter into the construction of the deed. By the deed, interest runs from majority or marriage; where interest runs from a term, that is to be held the term of payment. The term of payment was therefore majority or marriage. The circumstance of the father's making the distribution during his lifetime, would not have altered the general rule. The term of payment, that is, the majority or marriage, must be the rule.

Lord *President*.—This is a case to which the general rule cannot be applied. It is a question of construction entirely.

The

The clause is absurdly framed; Lord Reay has not had in view the case which has happened, that he might die before the majority or marriage of his children; he has looked to the case of his surviving these periods; and his intention has clearly been, that the first moiety should be payable at the majority or marriage of his children, always taking it for granted that he was to survive these periods; and the second or last moiety is made payable at his death: Therefore this is the same as if the father had said, the whole provision shall be due at my death. I am of a different opinion from that formerly delivered by the Court in the case of a legacy *Burnet v. Forbes*, where there is a *dies incertus*, I am clearly of opinion with the Lord Justice Clerk: But here the two conditions clash, and that construction is to be given to the deed which makes it effectual. If three children survive the father, the whole 36,000 merks vests by his death. It cannot remain unvested until the death of the other children, or rather until their majority or marriage. On the whole, there seems to be a case omitted, that the father's death might first happen. But as by the words of the deed, the second moiety, that is, the whole provision is made payable, in that event, the whole must vest.

Lord *Gardenston*.—The writer seems to have taken it for granted, that the father was to survive the marriage or majority of his daughters. If there be any meaning in the clause, it is that put upon it by the Lord President.

Lord *Dunfinnan*.—One half is due at the death of the father, the other does not vest, as the term of payment is uncertain.

Adhere, seven:

Alter, five:

For the Pursuers, Sol.-General, }  
Defenders, A. Abercromby, } Advocates.

Isaac Grant, C.S. }  
W. Lumsdaine, C.S. } Agents.

Lord Dreghorn Ordinary.

Menzies Clerk.

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## II. In the Ranking of the Creditors of REDCASTLE.

The Younger Children of the deceased Captain KENNETH  
M'KENZIE, Claimants;

AGAINST

WILLIAM CHALMERS, and Others, Creditors, Objectors.

A provision in a contract of marriage to children *nascituri*, though not demandable till after the death of the father, yet bearing interest from the marriage or majority of the child. The Court found, that the children were entitled to compete with the onerous creditors of the father.

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IN the 1767, Captain Kenneth M'Kenzie was married to Miss Jean Thomson, with whom he received a portion of L. 2000 Sterling. The contract of marriage which was entered into upon this occasion was betwixt Captain M'Kenzie and his father the proprietor of the estate of Redcastle, on the one part, and Miss Thomson and her father, upon the other part.

The estate of Redcastle was disposed by the father to himself in life, and to Captain M'Kenzie and the heir-male of the marriage in fee; whom failing, to the heir-male of any other marriage; whom failing, to the heir-female of that marriage; whom failing, to certain other substitutes; and the younger children are provided for by the following clause: “ And further, with respect to the children to be procreated of this  
“ present marriage, other than the heir so succeeding as aforesaid, he the said Kenneth M'Kenzie, with consent of his  
“ said father, binds and obliges himself, and his forefathers, to  
“ make payment to the younger children to be procreated of  
“ the marriage, the sum of L. 2000 Sterling money, to be divided amongst them in such manner as the said Kenneth  
“ M'Kenzie shall think fit by a writing under his hand; and  
“ failing such division, to be distributed amongst them equally; the said provision to be payable only at the father's  
“ death, and to bear interest from the majority or marriage of  
“ said children, whichever of them shall first happen; the  
“ said Kenneth M'Kenzie, and his forefathers, being always obliged to give the said children education suitable to their  
“ station; and to maintain them at bed and board, ay and  
until

“ until the period at which the interest upon their provisions  
 “ shall fall due and be payable, together with one-fifth more  
 “ in case of failure, over and above performance. For the  
 “ which causes, and on the other part, the said Mr. James  
 “ Thomson has instantly made payment to the said Kenneth  
 “ M’Kenzie of L. 2000 Sterling, of which sum he grants the  
 “ receipt, &c.

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Of this marriage there were four children, and Captain M’Kenzie’s father having died in the 1785, at which time the affairs both of the father and son were in great disorder, an adjudication was led in the 1789 by the younger children, alongst with the other creditors, for securing the provision of L. 2000 Sterling. Captain M’Kenzie died soon after, and a ranking and sale being brought, the younger children claimed to be ranked for payment of the arrears of aliment due to them, and for the sum of L. 2000, with interest thereof from the time of their father’s death. Objections being stated to both claims, the Lord Ordinary pronounced the following judgement: “ In respect that by the conception of the contract of June 9, 1791.  
 “ marriage, the father was bound to pay interest upon the  
 “ sums provided to the younger children of the marriage,  
 “ from the time of their marriage or majority, though the  
 “ payment of the principal sum was suspended till the death  
 “ of their father, finds it was competent to the younger  
 “ children to use diligence in their father’s lifetime; there-  
 “ fore repels the objections upon that head: Finds, that al-  
 “ though the father was bound to aliment the younger chil-  
 “ dren, according to his circumstances, which would be im-  
 “ plied, though not expressed; yet in respect of the state of  
 “ his affairs, the younger children cannot compete with one-  
 “ rous creditors for aliment; and therefore sustains the objec-  
 “ tions to the claim of aliment.”

This judgement was acquiesced in, in so far as regarded the aliment; but was brought under review by the objecting creditors upon the other point.

It has long been a settled point, that provisions to children, not payable till after the death of the father, could not compete with his onerous debts, and more especially a general provision to children *nascituri* in a contract of marriage; but if a clause, for payment of interest at majority or marriage, which is the single point specially founded on, shall be sufficient to take the case out of the rule, an easy way will be found for a man to provide for his children, though he should spend his estate, and in every ranking these claims will start up in formidable opposition to the just and lawful creditors, and although they could not have disquieted the bankrupt, they may ruin his creditors.

Argument for  
 the objecting  
 creditors.

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It is a mistake to suppose that the contract says one word, of interest being payable at marriage or majority ; it says, indeed, that interest shall be due from these periods, but nothing is made payable till the death of the father. Even had interest been payable from these periods it could not have been exigible during the father's lifetime ; and that being the case, the foundation of the plea on the part of the children is taken away.

The creditors must here refer to the late case of the Creditors of M<sup>c</sup>Tavish of Dunardry, 14th November 1787, where the Court found, that the children could not compete upon their provision with the onerous creditors of their father, tho' both principal and interest was made payable at the marriage or majority of the children.

There is this only difference betwixt that case and the present, that in this there is no room for pretending that the provisions could possibly have become payable during the father's lifetime. Until a division was made of the general provision of L. 2000 Sterling, none of the children could have any share which he could call his own ; and without specific provisions, there could be no claim for interest ; and as the father could not be compelled to divide, but might have deferred it to the last moment of his life, it must have depended entirely on his pleasure, whether any one of the children should have it in his power to exact one farthing of interest from him during his lifetime.

But further, the whole provision, both principal and interest, was suspended by the condition, that an heir of the marriage should first succeed to Captain Kenneth M<sup>c</sup>Kenzie : The words of the clause are, " and further, with respect to " the children to be procreated of this present marriage, other " than the heir so succeeding, as aforesaid," &c. This necessarily imports that the actual succession of the heir was a condition of the obligation ; for it is only with respect to the children " other than the heir so succeeding," that there is any obligation at all. During the father's lifetime, no one child could show that he or she was entitled to claim under the contract ; for, to the last moment of the father's lifetime it was possible that that child might be the heir, and consequently not entitled to claim any thing under the clause. The whole was therefore contingent and conditional during the father's lifetime.

But supposing this provision to be free of all condition, still it must be admitted, that it is a provision to children *nascituri*, payable only after their father's death, and consequently with all those marks and characters which have ever been held as discriminating a right of succession from a proper debt. The declaration,

claration, that it shall bear interest from the majority or marriage of the children cannot alter its nature; for it is not then made payable, nor is either principal or interest payable till after the death of the father.

Now, it is an agreed point, that if a man becomes bound to pay a certain sum for provisions to his children, so as that neither principal nor interest is exigible in his lifetime, the children have thereby no right on which they can compete with his onerous creditors. But if the reason of this doctrine be inquired into, it will be found, not to arise merely from the circumstance of the obligation being prestable after the death of the granter; for if an onerous obligation is constituted in this form, the creditor therein may compete with onerous creditors.

The reason must therefore lie in something else; and according to the conception of the creditors, it is founded on two considerations. The one, that a gratuitous right to children to claim a part of their father's property after his death, which they could not claim during his life, is substantially a right of succession, in whatever form it may be conceived: and the other, that it would be unjust to onerous creditors, were children suffered to compete upon such rights as could not operate against the debtor himself, in his own lifetime, and that it might give rise to many fraudulent and collusive practices.

From this view of the reason of the law, it will appear, that it does not depend upon the will of the father, whether a provision payable to children after his death shall compete with onerous debts or not; for though he declared, in the most express terms, that he meant the provision to be a proper debt, that would have no effect, and as he cannot directly convert a posthumous provision into a debt, so neither can he do it indirectly by the device of making it bear interest from some term which may happen during his own lifetime, when the provision is not exigible till after his death, and even the right of claiming interest is elusory.

A man cannot retain the property of his estate, and at the same time provide, that his just creditors shall be excluded from drawing their payment out of it. But this would in effect be done, if a man could by a provision in his contract of marriage secure a part of his estate to his children, by enabling them to exclude onerous creditors upon a latent claim of provision payable after his death.

A donation never can compete with a prior onerous debt: This is one of the first dictates of justice; it would be a fraud in the donee to take a donation, when the donor has not a free fund for payment of his debts, and upon this principle, all donations

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nations *mortis causa*, are postponed to the onerous debts of the donor. In the case of *præceptio hereditatis*, though the donation is *inter vivos*, and there should be a sufficiency of free funds, the donee becomes liable for all the prior debts, though they were ten times the value of the subject; it is held to be a right of succession merely from the relation in which the donee stands to the donor: and this instance illustrates the genius of our law, with respect to donations to children.

A man's children are naturally his heirs, and when a sum is provided to them to be taken after his death, the nature of the right must be construed according to the nature of the relation betwixt the parties. They may be so far considered as creditors as that they cannot be affected, by gratuitous deeds; but so far as heirs, they must be postponed to the onerous creditors of the father. This is the construction of all those rights, where the father is simply taken bound to provide a certain sum to the heirs or children of the marriage; and there is no reason for distinguishing that case from the present: It is indeed impossible to make any sense of a clause postponing the payment of a provision till after the death of the granter, unless he continues to have the free use and enjoyment of his funds.

The nature of the deed in question does further indicate the right to have been one of succession only. When a bond of provision is granted to a particular child, already in existence, there may be room for saying that a special debt was created; and yet it has, in such cases, been decided that onerous debts must be preferable. But contracts of marriage are deeds by which settlements of succession are ordinarily made; besides, where a provision is made in favour of the whole issue of a marriage, although not yet existing, and where there can be no affection for the individual, it bears every natural mark of a settlement of succession. And the latency of a deed of this kind, which lies generally in the repositories of the debtor till his death or bankruptcy, affords an additional reason for denying it effect, in a competition with onerous creditors.

Onerous and gratuitous obligations are, in many respects, essentially different. An onerous creditor may make his claim effectual as he best can: But the justice of the claim of a gratuitous creditor depends upon the state of things at the time when he comes forward with his claim. Suppose a man to be in debt, to have borrowed L. 10,000, and to have bought an estate; all his onerous creditors would come in upon the estate equally with the person who advanced the money. But if a gratuitous creditor, by a bond *in diem*, never heard of till the debtor's bankruptcy, should claim one half of the value of  
the

the estate from the creditor who advanced the purchase money, it is doubted if such a claim would be sustained.

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This argument applies *a fortiori* to bonds of provision to children, even to such as are payable in the granter's lifetime; there being betwixt such near connections much opportunity of collusion. And, accordingly, in two cases collected by Lord Harcarfe, the creditors were preferred to children, claiming upon bonds of provision payable in their father's lifetime. February 10, 1688, Stewart v. Robertson's Bairns, Harc. No 218; and February 1688, Harc. No 220.

By the subsequent decision in the case of Easter Ogil, it was found, that children claiming provisions, which might fall during their father's lifetime, could compete with his onerous creditors. The creditors do not mean to call that decision in question; but this inference they will be allowed to draw from the two decisions collected by Marcus, that no further extension should be made of the power of providing children to the prejudice of creditors, and that the rule laid down in the case of Easter Ogil should be strictly adhered to.

When provisions may possibly be payable in the lifetime of the father, there is room for argument that the right cannot be a right of succession: But when the principal sum is expressly declared not to be payable till after his death, then it is certainly a right of succeeding to the deceased. A man will be under some restraint as to the *quantum*, when a provision is made payable in his own lifetime; but if it shall be understood that he may provide any sum he pleases to his children, in such a manner that the children may compete with creditors, though they cannot disturb himself; this safe and convenient species of liberality will be extended very far, and the power of division will secure him against any disturbance from his children.

There is no case where children have been allowed to compete with onerous creditors, unless the provision, principal and interest, actually had, or at least might have become due, and payable during the father's lifetime. On the contrary, the whole series of decisions have interpreted strictly against such claims. Stair, 20th June 1672, Bannerman v. Creditors of Seaton, Dict. of Decisions, Vol. II. 281.—Fountainhall, 17th June 1697, Napier v. Irving. Lyon v. the Creditors of Easter Ogil, 29th January 1724. 31st January 1759, Ballingal v. Hendersons.

This was the argument used by the creditors in their first petition; but the Court having adhered to the judgement of the Lord Ordinary, the following additional views were given in a reclaiming petition. Feb. 2, 1793.

In no possible event could the children be creditors to their father under the contract: For, let it first be supposed, that the

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eldest daughter had been married during the lifetime of her father, and that she and her husband had brought an action against her father, what could they have claimed? not the principal sum, for that was payable at the father's death: But they might have claimed interest, for the interest was made payable from the marriage: Yet had such a claim been made, the father might have opposed to it, his power of division; and contended, that during his lifetime, no demand was competent either for principal or interest. The clause upon which the demand is founded, he might have said, applies solely to the event of my death, before the marriage or majority of my children; that it does not apply to the case of my surviving these terms, is evident from this, that there is no provision payable, and none can be fixed during my lifetime, without my consent. This defence would have been conclusive and unanswerable.

Let it next be supposed that they had claimed aliment; and here the same defence would have been good which has been stated with regard to the payment of interest. The obligation to aliment the younger children was intended as an obligation on the heir, in the event of the father's death; for, during his own lifetime, the obligation was unnecessary: and surely in consequence of the natural obligation on the father, it will not be maintained that he was bound to aliment his daughters after their marriage, or his sons after their majority, and when by their education, they were enabled to acquire substance for themselves.

The children have founded on the distinction of the Roman law, betwixt the existence of the obligation and of the term of payment; and have contended, that the provision vested in them from their birth, although the payment was postponed till the death of the father. Now, suppose, that during the lifetime of the father one of the children had died during its infancy, the *jus crediti* or right, vested in the child, must have transmitted to the next of kin, and to the extent of that child's share, the father must have been limited in his power of division. But the supposition is utterly irreconcilable either with the words or meaning of the contract; and upon the death of the child, the father would have been entitled to distribute the full sum of L. 2000 Sterling amongst his remaining children.

In like manner, had the second son of Captain M'Kenzie attained majority during his father's life, and died after executing a will, what action could the legatee have maintained against the father? According to the plea of the children, this legatee must have succeeded in claiming interest upon the second son's share from his majority, and payment of the principal upon the death of the father. But it is evident that that plea is untenable. The father would have been entitled

titled to say, that, had the son lived, he should have felt himself at liberty to have given him a part of the L. 2000, or not, just as circumstances rendered it proper: But that now he was dead, he was entitled to distribute the whole amongst his surviving children. And this defence must have been sustained.

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In the outset, the children must observe, that the present question arises on a contract of marriage, and not on a bond of provision; these two stand on a footing extremely different. Bonds of provision are in general merely voluntary deeds on the part of the father, not delivered, and consequently revokable till death. Unless therefore children can show that bonds of provision have been delivered, and that, at the time of delivery, the father was solvent, they are not admitted as proper creditors against his estate; whereas contracts of marriage which are bilateral deeds, are binding from their date; and cannot be reduced as gratuitous, unless they are irrational or fraudulent.

The decisions upon this point have been reduced into a clear and established system. In general, where a man binds himself by mutual contract, or by an unilateral deed duly delivered, to pay a sum of money, at a certain though a future term, either to persons existing, or to children *nascituri*, it is an effectual obligation; and whether the obligation is onerous or gratuitous, if the granter was solvent at the date of the deed, or of delivery, it is effectual. But as parents, by granting provisions to their children, frequently intend to give them nothing more than a right of succession, reserving to themselves, during life, the full enjoyment of their estate, and consequently the power of contracting debt; it has been understood for a long tract of time, and has grown into a rule of law, that where the obligation is not to take place till after the death of the father, such provision cannot compete with the onerous debts of the father.

The principles founded upon by the creditors, and the authorities resorted to, do all of them apply to this case, where the father himself cannot be affected by the claim of the child, though his creditors may; and which undoubtedly might prove an inlet to fraud and abuses of various kinds. But where it appears from the contract, that the children have a right of credit, then it is equally certain that these provisions cannot be set aside in a competition with the most onerous creditor. There are no precise words, nor is any particular form necessary for constituting the provision in this manner; and therefore, whether such provisions are, or are not proper debts, must resolve into a question of construction.

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The circumstances are various from which the intention of parties to create a *jus crediti* is inferred. In particular, it has been held, when the provisions are made payable, or begin to bear interest, at a term which may arrive in the father's lifetime, that they are proper debts. Thus, Mr. Erskine, B. 3. tit. 8. § 40; and Lord Bankton, B. 1. tit. 5. § 17.—Sir Alexander Hamilton of Haggs, 21st February 1698.—Heirs and Creditors of Sir Robert Preston, 15th July 1691.—Creditors of Easter Ogil, 24th January 1724.—Ballingal v. Children of Henderson, 31st January 1759.

Other circumstances, besides the term of payment of the childrens provision have been held sufficiently indicative of the father's intention to create a proper *jus crediti* in favour of the children. Dict. of Decisions. Vol. II. p. 281.—Nae-smith v. Brands, 20th January 1731.—Mary M'Donnell v. The King's Advocate, 20th June 1758.

In the present case, there can be no difficulty upon the clause of provision founded on by the children; for although the stock is not payable till the death of the father, the interest is payable from the marriage or majority of the children; and it follows, that during the father's lifetime the capital was due, and consequently, that the children were constituted his proper creditors. To suppose interest due, when there is no stock, is an evident solicism. When interest is due from one term, and the principal is payable at a future one, *dies credit sed non venit*, and this is the usual way of constituting a proper obligation. Thus, if one grant a bond for borrowed money, the lender becomes a creditor to the borrower from the date of the advance, from which time interest is due, although the principal is not payable for some time: the creditor has a right in him, which he may transfer to his assignee, or transmit to his heir.

The children shall now consider the objections which have been made by the creditors.

The creditors suppose the case of an individual child claiming implement of the contract from the father; and they endeavour to show, that such a contract would be disappointed. But the fair case to be put is, that the whole younger children collectively were claiming implement of the contract. What defence could Captain M'Kenzie have brought against a claim so made? He could not have got quit of the interest after the majority or marriage of his children, in payment of which he was expressly bound.

The creditors next insist, that the power of division in Captain M'Kenzie would have enabled him to disappoint the claim of any one child. But the fallacy of this consists in supposing the action to be brought by one only. The father, in this case, had a power of division by the contract, as well as at common law:

law : But that did not create a power of diminution, his right in the general provision was not increased, nor was the interest of the children, as creditors *in familia*, diminished; the father was due to the younger children L. 2000, and this sum he was bound to pay, and it was as effectual a debt in a competition with onerous creditors, as a provision to a single child would have been. In the case of Easter Ogil, the father had a power of division similar to the power which Captain M'Kenzie possessed : but the Court found that the children were proper creditors.

The creditors seem to maintain that there is no proper *jus crediti* in the children, which would transmit to their heirs, or could be affected by their creditors; but this the children dispute. The right does not depend upon the extent of the share to which a child may be entitled, and therefore to the extent of the share of each child the *jus crediti* of that child cannot be taken away.

It has further been said, that the obligation was suspended by the condition that an heir of the marriage should succeed to Captain M'Kenzie in the estate. But, 1. The expression of children other than the heir, means only, the younger children. 2. The provision being intended for the younger children, it was necessary to point them out, so as to distinguish them from the heir who was to get the land estate; and it is evident from the whole of the clause, that it was not meant, by mentioning the heir, to suspend the obligation upon the father.

## AUTHORITIES.

I. " Mr. Alexander Seaton was bound, by his contract of marriage, in the event that there were only heirs-female, or daughters of the marriage, to pay them a certain sum at their age of fourteen years;" and, in implement of that obligation, he assigns to the only daughter of the marriage, a bond for L. 5000 Scots." A competition arose betwixt the daughter and the father's arresting creditors. Alledged for the creditors, " That the daughter's assignation being betwixt most conjunct persons, was fraudulent and null, and could not prejudice the father's creditors; and that implement of the mother's contract of marriage, was never sustained as a cause to prefer children to onerous creditors, who, in that case, could never be secure, if such latent clauses might prejudice them, especially when, at the time of the assignation, the father had no other means, and thereby became insolvent." It was answered, " That albeit clauses in favour of heirs of a marriage, importing that they must first  
" be

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“ be heirs, can have no effect against creditors; yet here they  
 “ are only designed heirs, as being they who might be heirs  
 “ if their father were dead, but need not actually be heirs,  
 “ because their sum was payable to them at their age of  
 “ fourteen years; which age they were passed before the  
 “ assignation, and so they might have pursued their father  
 “ for payment of the sums.” The Lords preferred the ar-  
 resting creditors, the mother of this daughter being alive at the  
 time of this assignation, albeit it was alleged she was past sixty.  
 Stair, June 20, 1672, *Bannerman v. Creditors of Seaton*.

II. “ One, in his contract of marriage, being obliged to pro-  
 “ vide 20,000 merks to himself in liferent allenary, and to the  
 “ bairns of the marriage in fee, with a provision that they  
 “ should have right thereto, without representing him, and  
 “ he not having employed the sum, but contracted debt after  
 “ the marriage, in a competition betwixt the children and the  
 “ creditors, the Lords found, that the obligation only import-  
 “ ed a destination of succession to the children, and that they  
 “ were not to be looked upon as creditors from the date of the  
 “ contract, in competition with onerous creditors, but only  
 “ from the time the diligence was done upon the obligation  
 “ and so did not bring in the children *pari passu* with any cre-  
 “ ditor whose debt was contracted before the children’s dili-  
 “ gence, though the children’s adjudication was within year  
 “ and day; because the obligation, *quoad* the children, being  
 “ considered as granted of the date of their diligence, was look-  
 “ ed upon as *post contractum debitum*, and the father was then  
 “ bankrupt, *Harcus’ Contracts of marriage*, February, Fal-  
 “ coner, Hume, 21st November 1682, *Creditors of Majori-*  
 “ *banks v. Majoribanks*.”

III. “ Mr. William Robertson being obliged, in his contract  
 “ of marriage, to provide 200 merks to the heirs by way of  
 “ destination, and without any obligation to re-employ it if  
 “ uplifted, did, at his going to be married for the second time,  
 “ when he was abundantly right and solvent, grant a bond  
 “ of provision to the children of the first marriage *nominatim*;  
 “ of which reduction being raised as of a latent and fraudu-  
 “ lent deed, at the instance of posterior creditors, it was  
 “ alleged for the children, that the contract of marriage  
 “ was onerous; and as lucrative deeds are valid against poste-  
 “ rior creditors, *multo magis*, these bonds which are onerous,  
 “ especially when it is offered to be proven that they were  
 “ delivered to the defender’s grandfather long prior to the  
 “ contracting the pursuer’s debt. Answered, That if bonds of  
 “ provision to children were sustained against lawful creditors,  
 “ and strangers, no man would be in security to contract with

“ pa-

“ parents ; for there is that confidence among near relations,  
 “ that a thousand conveyances would be made, and the pa-  
 “ rents, or the trustee have them in their power, to use or de-  
 “ stroy them as they saw occasion, unless such bonds were  
 “ made some way public, that persons be put on their guard,  
 “ as to having any after dealing with these parents. And here  
 “ the one of the sums was payable at the bairns’ respective  
 “ age of twenty-one years, and the other half at the father’s  
 “ death. Besides, that the bond contained assignation to  
 “ bonds, in corroboration thereof, the sums were afterwards  
 “ lifted by the father, and the assignation never intimated,  
 “ which argued some fraudulent design ; and there is less dan-  
 “ ger of any thing fraudulent in bonds granted to strangers  
 “ *ante contractum debitum*, than in bonds granted to bairns,  
 “ especially those *in familia*, who are more at the father’s dis-  
 “ posal, and in his power ; and private back-bonds between a  
 “ father and his children, might be kept always in his power,  
 “ though after delivery. 2. In real rights of lands, latent  
 “ prior deeds, and interests in favours of children, are not sus-  
 “ tained against posterior creditors, as in the cases of Balloch-  
 “ mill and Majoribanks’ *multo minus* personal bonds. The  
 “ Lords preferred the posterior creditors, though the debtor  
 “ was not a trading merchant, and was not bankrupt at the  
 “ granting of the bonds of provision, he being now bankrupt  
 “ by cautionry, February 10, 1688, Mr. Robert Stewart  
 “ advocate v. Robertsons bairns, Harc. No. 218.”

IV. “ Inergelly having given bonds of provision to his chil-  
 “ dren, whereon infestment followed after his death, the  
 “ Lords reduced the bonds upon the same reasons urged for  
 “ Robertson’s creditors against his bairns, Supplement No. 218.  
 “ The bonds not being notified by some public deed in the fa-  
 “ ther’s lifetime, though assignations intimate to the debtor,  
 “ would sustain against posterior debts ; and here the creditors  
 “ were anterior (perhaps a mistake for posterior) and the fa-  
 “ ther no merchant, but a landed gentleman, February 1688,  
 “ Philip Anstruther v. the Children of Inergelly ; and it was  
 “ not respected for the children, that the father at the time  
 “ of granting the bond, was no bankrupt, though that is sus-  
 “ tained for strangers, February 1688, Harc. No. 220.”

V. “ The Lords (24th July 1696), had preferred Tayoch to  
 “ the daughters, they reclaiming by a bill, were allowed ano-  
 “ ther hearing *in presentia*, when it was alledged, that though  
 “ provisions in contracts are *pendulous till the existence of*  
 “ *the children, and their arriving at such an age* ; yet how  
 “ soon these conditions were purified, they became simple,  
 “ free, and real creditors, especially against all debts contract-  
 “ ed after the obligation in their favours ; and the L. 9 § 1.  
 “ De

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“ *De qui potior. in pign.* says very well *creditorem sub conditione*  
 “ *tuendum esse adversus eum cui postea aliquid deberi incepit.* It  
 “ is confessed, where clauses are conceived by way of substi-  
 “ tution or destination, they are no more but a regulation  
 “ of the succession among the children of several beds, in  
 “ which respect they are onerous also ; but where the clause  
 “ runs by way of obligation to pay, whether in his own life  
 “ or after his death, the same are neither gratuitous nor re-  
 “ vocable deeds, but may compete with extraneous creditors,  
 “ according to the date of the diligence they have done. An-  
 “ swered, contracts of marriage are favourable and onerous,  
 “ in so far as concerns the liferents provided to wives ; but  
 “ *quoad* children’s provisions, they are never reckoned onerous  
 “ but in competition with the father or children of another  
 “ marriage, and noways restrain or bind up the father from  
 “ contracting posterior debts (else they would have the force  
 “ of an interdiction), but only that he shall do no voluntary,  
 “ gratuitous, or fraudulent deed to their prejudice, and that  
 “ it was so found, 24th January 1667, *Grahame v. Rome*,  
 “ where the Lords preferred an extraneous creditor to a bairn  
 “ upon the contract of marriage, and that purging the condi-  
 “ tion, was not retro-binding to the prejudice of the interven-  
 “ ing debts ; only the decision marks that it was stopped till  
 “ farther hearing : but the Lords having reconsidered this  
 “ case of *Tayoch’s* they generally (*none dissenting save one or*  
 “ *two*) preferred him to the daughters, and would not so much  
 “ as bring him in *pari passu*, though it was urged that her  
 “ husband was a singular successor, and in *casu favorabili* having  
 “ *intuitu* of his marriage granted a jointure to his wife, *Foun-*  
 “ *tainhall*, 17th June 1697, *Napier v. Irving.*”

VI. *Lyon v. the Creditors of Easter Ogil*, 24th January 1724, collected by Lord Kaimes. William Lyon younger of Easter Ogil, became bound, in his contract of marriage, if there should be only daughters, and no heir-male of the marriage, to pay to the daughter, or daughters, the provisions following, viz. If only one the sum of 9000 merks, if two, &c. which provisions were payable at their respective marriages, if the same happen in their father’s lifetime ; if not married in his lifetime, at their respective ages of eighteen, or at the first Whitsunday or Martinmas after the father’s death, whichever of these two terms should last happen. There is a power of division given to the father. There was no heir-male of this marriage and only one daughter Mrs. Margaret Lyon. The father had entered into a second marriage, and his affairs were going into disorder, when an adjudication was led by Mrs. Margaret Lyon, with the consent of those at whose instance execution was, by the contract, directed to proceed.

For

For the creditors it was pleaded, that this daughter is to be considered as an heir, and as such is liable *in valorem*; nor can it alter the case, that the provision is in the form of an obligation, since the right of every heir of provision is founded upon an obligation of one kind or another; and as these obligations are commonly to persons *nascituri*, they have been interpreted into a provision of succession, which although it cannot be gratuitously defeated by the father, cannot compete with his onerous creditors; neither is it of any consequence whether these provisions became due after the father's death, or at a certain period of the children's age, which may fall out before or after the father's death, and no one doubts that such a provision is of the same nature with a provision of a land-estate to the heir-male of the marriage, where the onerous debts of the father will burden the estate.

To this Mrs. Margaret Lyon answered, that if it be possible in a contract of marriage to give a *jus crediti* to children, it has been done here. When provisions are conceived in the form of provisions to heirs, they cannot compete with the father's creditors; as heirs, the children are liable *in valorem*, but this contract is conceived in a different form; the daughters are rendered creditors to their father: nor is this daughter apparent heir, there is a son of a second marriage, and if she outlive the term of payment, the provision will vest and transmit to her next of kin, even though her father be then alive; all which is incompatible with a right of succession. It is no solid objection that the provision is to children *nascituri*: Had the obligation been to the children to be procreate of any other person, there can be no doubt of the validity of the obligation; and the law makes no difference that it is in favours of the granter's own children, since, by the obligation, these children were not to represent him, nor is there any ground in law upon which these obligations can be reduced by subsequent creditors, otherwise than by priority of diligence.

The Lords found the creditors not preferable, but that the daughter must come in *pari passu* with them, according to their several diligences.

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Such were the authorities resorted to by the parties in this cause. When the question came to be decided, the following opinions were delivered.

Lord *Monboddo*.—An obligation in a marriage-contract to children, whether born or *nascituri*, which gives a right of credit to the children, may be secured by diligence; but a mere right of succession cannot be the foundation of diligence. A bond to children *nascituri* has the same effect on their existence

Opinions.

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tence, as if they had been alive at the time of granting it: Here the obligation was onerous in consequence of the wife's tocher, aliment was given to a certain period, and annual-rent during the life of the father. Upon this ground I am for adhering to the Lord Ordinary's judgement; at the same time, had it not been for the circumstances I have taken notice of, the decision must have gone the other way.

*Lord President.*—Were it possible that there could have been a demand made for the provision during the father's lifetime, Lord Monboddo's opinion would be right; but it was not possible to ascertain, during the father's life, who was the heir, of course it could not be known who were meant by the other children, and therefore no demand could be made during his life. The intention of parties seems to have been, that the father's death should be the term of payment, and that the interest should go for aliment. It was unknown till the father's death who had a right.

*Lord Justice Clerk.*—If this reasoning be good, it is applicable to every case where a provision is given to younger children; but there is a satisfactory answer, the eldest son at the time is the heir, the other children may bring their action and secure their provision by adjudication: no doubt the eldest son may die, but the only consequence of that would be, to make the next eldest the heir, who would, of course, fall out of the decree of adjudication. Were an action to be brought at the instance of one of the younger children, the father might, to be sure, say, "Sir, you have no right to bring this action, I have it in my power to give this provision to my other children and to leave you penniless." But when the action is brought at the instance of them all, as they are creditors to the full extent of the provision, and as the father cannot deprive them of it, the action must be competent. The father may divide the provision as he thinks proper, although it may have been secured by an adjudication, for the adjudication only secures the provision to those who shall be ultimately entitled to it; it secures a fund for the *jus crediti* arising to the whole under the settlement, without establishing a distinct right in any one child. There is an obligation to aliment, before the payment of interest commences, and from the whole of this deed taken together, the intention of the parties is clear: Besides, there has been a decret-arbitral in this case; now, though originally the provision had been of the nature of a succession, the decret pronounced during the solvency of the debtor establishes that he was thereby denuded, and the estate settled on the heirs of the marriage, and subsequent creditors had no right to complain; I therefore am for adhering.

Lord

Lord *Eskgrove*.—I am for adhering to the former judgement. Every question in a marriage-contract, in which children are concerned, is to be interpreted favourably for the children, for marriage-contracts, so far as children are concerned, are onerous, and entitled to a liberal construction in favours of the children. If clauses appear which can receive no other interpretation than a *jus successionis*, there is no help for it: But when a provision is given in terms that bestow a *jus crediti*, and give a ground of action to the children against the father, they are as truly onerous as any debt which the father can be owing. This contract gives a provision to the children; had there been trustees, might not they have pursued the father for a security? surely. Had the marriage dissolved after the existence of two children, then the younger must have had an interest to pursue for security: When there are more, they all have a joint interest. It is highly proper for the community that obligations of this kind should be liberally interpreted.

State of the vote, *adhere* or *alter*.

*Adhere*, Lords Justice Clerk, Alva, *Eskgrove*, Swinton, Monboddo, Stonefield.

*Alter*, Lords Hailes, Ankerville, Henderland, Dreghorn.

The Court adhered to the former judgement.

Judgement.

|                                |              |                   |           |
|--------------------------------|--------------|-------------------|-----------|
| For the Children, W. Honeyman, | } Advocates. | A. Swinton, W. S. | } Agents. |
| Creditors, Al. Abercrombie,    |              | K. M'Kenzie W. S. |           |

Lord Justice Clerk Ordinary.

Home Clerk.

Vol. XI. No. 8.

## RANKING AND SALE.

Mrs. CATHARINE BROWN, and Others, Claimants ;

A G A I N S T

The YORK-BUILDING's Company.

In a ranking and sale, the debts must be accumulated at the date of the sale ; not of the division of the price.

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I.

IN the 1777, an act of parliament was passed empowering the Court of Session to sell the estates belonging to the York-building's Company, previous to the ranking of the creditors, and contrary to the practice at that time established by law. In virtue of this statute the estates were brought to sale in the 1779, 1782, and 1783, and produced the sum of L. 361,000 Sterling.

Some of the creditors, who appear as claimants in this question, had obtained adjudications prior to the 1770, and others had not constituted their debts until the 1790. In the 1791, they applied to the Court for warrants, and insisted that their debts should be of new accumulated at " the term of Whit-  
" funday 1779, when the price of the estate of Winton be-  
" came payable." Upon this point, the Court first ordered  
July 8, 1791. a hearing, and then appointed the parties to lodge memorials.

Argument for  
the Creditors,

The creditors shall consider, I. What, in the general case, is the way of dividing the proceeds of a bankrupt-estate amongst creditors. II. Whether there is any thing, in the circumstances of the present case, that can justify a deviation from the general rule.

I. Judicial sales were introduced by the statute 1681, c. 17. This act declares, " that the price which shall be gotten  
" for the said lands, conform to the roup, shall be distribute,  
" &c. amongst the creditors proportionally, according to their  
" several sums, rights, and diligences, as they are, or shall  
" be ordered and found preferable by the said Lords, whether  
" the said creditors have compeared or not."

It

It is clear, from this statute, that the sale might precede the ranking; and it is expressly enacted that the price shall be distributed amongst the creditors, and consequently the profits of these shares of the price must belong to those who had right to the shares.

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By the statute 1690, c. 20. it is provided " that if no buyer be found at the rate determined by the Lords, it shall be leifome to the said Lords to divide the lands, and other rights, among the creditors, according their several rights and diligences."

Had such a division ever taken place, there can be no doubt that the rents arising on the different portions of the estate would have belonged to the creditors to whom these portions were allotted.

The import of these statutes is further illustrated by 1695, c. 6. which authorises the purchasers of bankrupt-estates, to consign the price, with interest, in the hands of the city of Edinburgh, at the distance of one year from the date of the decree of sale. It is clear from this act, which declares, that the price shall bear interest " for the greater benefit of the creditors." That it was understood by the legislature, that the interest was to go to the creditors.

Another statute of the same year, c. 25. authorises apparent heirs to bring the estates of their predecessors to sale, whether they be bankrupt or not; and in the processes on this act the sales have universally preceded the ranking. It is probable that c. 6. had a view to both sorts of sales; and, by § 26, of the regulations concerning the session, it is declared, that in the sale of bankrupt-estates, the ranking shall precede the sale.

This regulation was observed till the 1783; but it was usual to reserve many questions for discussion in adjusting the division of the price; and the sales at the instance of apparent heirs, were not affected by this regulation. Nor does it appear that either before or since the regulation 1695, any doubt has been entertained, that the interests arising on the price of the subjects sold judicially, belonged to the persons to whom the price was payable in the proportions that each drew of the price; and accountants, at whatever time the state was prepared, calculated the claims as they stood at the moment that the price began to bear interest.

From the records it appears, that previous to the regulations 1695 the sales preceded the ranking, and the creditors drew the interests arising upon their dividends from the periods when they yielded interest in the hands of the purchaser \*.

As

\* The cases referred to, are :

1. Sale of the estate of Binny, &c. and Ranking of the Creditors of Hugh Sinclair, decret of sale, dated 27th June 1684; decret of ranking, 25th February 1698. M'Kenzie's Office.

2. Sale

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As far as can be discovered no difficulty occurred in practice till the year 1754, when it is said that the Trustee of Sir John Gordon, demanded that the interests arising on the price of the estate, while the ranking was depending, should be added to the fund of division, for the benefit of the postponed creditors. Lord Elchies, the Ordinary in the question found, that the preferable creditors were entitled to be ranked on the price of the estate, which bears interest from Whitsunday 1751, for their principal, interest, and actual expences, to be made a capital, bearing interest from Whitsunday 1751, and remitted to an accountant; and this judgement being reported to the Court, their Lordships adhered to it †. This decision is the more remarkable, that it was pronounced in a case which (as appears from Erskine's Institutes, tit. Adjud.) had led the Court to pass the act of sederunt of the 10th August 1754, by which they directed the expence of the process of sale to be paid out of the general fund.

That decision affords a strong argument in the present case. The successful argument there was, that being a sale at the instance of an apparent heir, exercising a power conferred by statute, he was in a situation similar to that of a trustee selling an estate for behoof of creditors; and that being the case, each creditor was entitled to the share of the price corresponding to his debt, and consequently to whatever arrears of interest should grow upon that sum. But the sale of bankrupt-estates is much stronger. It is in fact the old mode of apprisement, applied to a commercial period of society. The decree of sale may therefore be considered as an apprising for behoof of the whole creditors, whereby the true value of the estate is ascertained; and all the subsequent proceedings are merely to adjust the interest of the competitors in this common subject.

2. Sale of the estate of Trabrown, and Ranking of the Creditors of George Graham, decree of ranking, dated 15th January 1791. M'Kenzie's Office, but the decree of sale not on record.

3. The Sale of Harvieston, &c. decree of sale, dated 6th July 1692; of ranking, 8th February 1693. Dalrymple's Office.

4. Sale of Hallyards, Humber, &c. decree of sale, 26th February 1691; of ranking, 7th February 1695. Durie's Office.

5. Sale of Mey, decree of sale, 28th July 1694; ranking 21st February 1695; and decree of division of the lands, 28th February 1696. M'Kenzie's Office.

6. Sale of Nicolson Cockburn's-path, decree of sale, 7th February 1694, of ranking, 14th February 1694. Durie's Office.

7. Sale of Borthwick-Brae, sold, June 1694, decree of ranking, 30th July 1697. M'Kenzie's Office.

8. Sale of Sirven-Mains, decree of ranking, dated 20th July 1700. The sale had taken place in the 1694. Dalrymple's Office.

† The account of this case seems to have been taken from the decree of ranking of the creditors of Sir William Gordon, p. 320, and 343, are referred to.

But

But whatever share of it is found to belong to any one, the fruits of that share must belong to him likewise.

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A decision was pronounced in the 1767, which strongly confirms these observations, Faculty Coll. No. 68. The case was this: A ranking and sale of the estate of Dudhope was brought by the disponees to an heritable bond affecting that estate, and more than sufficient to exhaust the price of it. The estate was sold in the 1744, when Blackwood of Pitreavie, who had a previous right to the heritable bond, brought a reduction of the ranking and sale. The Court repelled the reasons of reduction; but found that Pitreavie was entitled to the place of the other disponees in the ranking of the creditors. During the dependence of this dispute, the interest on the price had arisen to L. 20,000 Scots, and the postponed creditors insisted that the division should take place at the period of Pitreavie's decision, and not at that of the purchaser's entry to the lands. The cause was taken to report by Lord Pitfour. For the creditors, it was argued, that the ranking of the creditors was not adjusted until the issue of Pitreavie's reduction, and that therefore the sale had been premature; but that this circumstance ought not to affect the interests of the postponed creditors. On the other side, it was said, that the purchaser in a sale becomes debtor to the creditors for their proportions of the price; and it is at this period that the debts are accumulated, because the annualrents of the price must belong to the same person who has a right to the price itself. It is upon this principle that a debt is accumulated by a decree of adjudication; and, for the same reason, if a debt bearing interest be assigned in security of another debt not bearing interest, the last will bear interest against the cedent from the date of the assignation, 25th January 1699, Inglis v. M'Morran. It is therefore of no consequence whether the ranking be after or before the sale, the scheme of division must be made out at the date of the sale, and the debts accumulated for that period: Drummond v. Angus 1754, the judgement of the Court was, "Find, that the creditors in the heritable bond ought to be ranked in the scheme of division *prime loco* upon the price of the lands, for the principal sum, and annualrents thereof, due at Whitsunday 1744, the term of the purchaser's entry."

The Court held it to be of no importance that the sale preceded the true conclusion of the ranking; and they proceeded upon this solid principle, that the purchaser becomes debtor for the price to the creditor, and that it is impossible that either the postponed creditor, or the bankrupt should be entitled to avail themselves of the delay necessary for settling the rights of the preferred creditors.

The 23d of Geo. III. c. 18. repealed the regulation 1695, and directed the sales to precede the ranking; and although at  
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no former period, has there been a greater number of sales, than since the passing of that act, yet in no one instance has a postponed creditor objected to the former mode of calculating the debts.

The creditors have in vain searched for authorities in opposition to those which have been stated; and although a great deal of ingenuity has been displayed by the counsel for the Company, in order to show that the practice is erroneous, the creditors do not perceive that these remarks affect their plea.

It has been said, that an accumulated sum, consisting of principal and interest, can be made to bear interest only by an act of the parties, or by the judgement of a Court: The following observations are fatal to this argument.

In the first place, if, in lieu of a debt that bears no interest, a creditor acquires a right to a subject that bears interest, he is certainly entitled to that interest; a creditor who draws his dividend at the moment when the price is payable, is entitled to the profit arising on that dividend; where he does not draw his dividend for some time, it is plain that the interest payable on it by the purchaser must be his: The question therefore is, whether the dividend be the property of the creditor at the time of the sale, and this must be answered in the affirmative. The debts pass to the purchasers, the law authorises this transfer, and accordingly renders the price payable to the creditors. Thus, whatever the nature of the debt was, it is transferred for a subject bearing interest; and no person is entitled to intercept the profits of this subject, which comes in place of the debt.

The accountant, in his scheme, accumulates every debt as at the date of the sale, or at the time at which the price is payable; but this is merely for the purpose of ascertaining precisely the share which falls to each debt, and interest arises on that share, not in consequence of any decree of accumulation, but merely from the legal transfer.

In the times of the old appraisings interest was not lawful; but when lands, according to the real value of the debt, were transferred to the creditor, he was consequently entitled to the profits of the lands, though formerly the debt had yielded no interest.

It has been said that many of the debts are not yet liquidated; but if the sale be a judicial appraisement of an estate, for behoof of all the creditors, whether they appear or not, their accession being supplied by an act of the law, there is surely no impropriety in holding the dividend to belong to them. The same happens where a charge of horning is followed by denunciation, interest runs on the just debt, although a suspension

son may have been preferred, and the debt properly ascertained only in the process of liquidation.

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By the act of his Majesty, the act of the Court, vesting the estate of the bankrupt in the trustee for behoof of the creditors, is an adjudication accumulating their whole debts at that hour, although not one claim may be liquid; yet it never was suspected that any remedy was introduced by this act, hostile to the general principles of law. Their accumulated debts may be objected to, and mitigated for years, but a debt is not the less just on this account; and, in rankings, the suspicious nature of one claim, or the difficulty of ranking the creditors, will occasion delays to all the creditors, let their debts be ever so liquid; and, with submission, there is no sense in encouraging the postponed creditors to litigate, in order to obtain the interim profits arising on the dividends of debts which did not bear interest, yet this is the unavoidable consequence of the doctrine maintained by the Company.

It is said, why fix the period from which the price bears interest for the accumulation of the debts? it should be either the date of the act sequestrating the estate, or the period of the division. The answer is, that the sequestration does not vest the estate in the creditors; it is the decree of the sale which liquidates the property for behoof of the creditors: Besides, rents are not like interest, they do not arise equally from every part of the subject; part of an estate may be very valuable, though it yields no rent, while another, may yield a great rent, though comparatively of little value.

It was said, that were the estate to be divided agreeably to the act 1690, then the creditors would have right to the rents, or they must give up the principle by which they claim interest as an accessory; and if they have such right, then they must give up the act of sale as the period of accumulation. But there is nothing in this argument, a decree of division vests the property of the estate in the creditors, and each will have a right to the future rents of his own share; but it does not follow, that he has a right to the previous rents, these are not accessories of the shares.

In fine, it was said, that the purchasers were bound to the Court as trustees for all concerned, and not to each creditor for his dividend. The creditors do not perceive the force of this; they have no occasion to show that a purchaser is in the same situation as if he had granted separate bonds to each creditor for his share; they have no objection to their being considered as a body, and that if one deserts his interest, the rest, not the purchaser, will derive the benefit: But it surely does not follow that the creditor, who appears and claims, shall not have his share with all its profits.

It now remains to be considered, whether there be any thing

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thing in the present ranking, that should place the bankrupt in a more favourable situation, and entitle him to reap the profits arising on the dividends of the different creditors.

The object of the statute, under authority of which the estates of the Company have been sold, was to authorise an immediate sale, without waiting the conclusion of a ranking which had depended above forty years : In other respects the statute left the law untouched, and the Court are directed to divide the prices in the same manner as in other sales ; and it is expressly declared, that the purchasers “ shall find sufficient security or caution for the due payment of the purchase-money, to be offered by them respectively, to the creditors of the said Governor and Company, as they shall be ranked and preferred by the decree or decrees of the said judges.”

The argument maintained by the Company, on this point, amounts to this, That as the law stood at passing the statutes, the ranking must precede the sale, and *pendente lite nihil innovandum est*. The legislature, therefore, never could mean to make the situation of the Company worse than it was originally ; yet to accelerate the sales, to accumulate the debts at that period, and to make the whole bear interest several years earlier than it otherwise would have done, was to make the situation of the Company much worse : Besides, as the sales were to be conducted for the benefit of the Company, as well as of the creditors, it was a necessary consequence, that the interest of the price should go to them who would have reaped the benefit of the rents.

This argument proves too much, as it is evident that every warrant obtained by a preferable creditor, is, according to that reasoning, detrimental to the Company, and consequently unjust. But it is obvious that the maxim *pendente lite nihil innovandum est*, does not apply to the case where the legislature interposes to further the ends of substantial justice ; and the expediting the payment of creditors is a fair and just object for the legislature to promote. It is impossible then for the Company to argue, that the legislature did not mean to deprive them of the advantages which they held, as the law formerly stood, when the reverse was evidently the intention of the legislature. The very silence of the act, on this point, proves it ; for, by ordering a sale, it was equivalent to ordering an accumulation of the debts, and had the legislature meant to prevent this accumulation, they would have said so in the act.

It has been said, that accumulations at each sale was the necessary and absurd consequence of the argument maintained by the creditors. But this is attended with no difficulty : It happens every day, that estates are sold at different times, but the accountant finds no difficulty in dividing the prices, although those of the different lots of the estate are payable, and bear interest

interest from different terms. In the ranking of Messrs. Alexanders' creditors, and in the ranking of the creditors of Sir Thomas Dunlop, the sales were carried on in this manner; but there were no successive accumulations, as many were admitted on the first sale as there was room for, and if any class was not fully paid out of that sale, it drew its balance from the next. Sometimes accountants, for greater facility, assume an arithmetical mean among the sales, and make one general division among the whole debts: But this has never given rise to any dispute which required the decision of the Court.

It is not the genius of the law of Scotland to extend claims of interest of any kind. Simple interest is not a necessary consequence of a debt; the rule is, that interest is not due *nisi ex lege vel pacto*, and it is in very few cases that the law interposes to create interest upon a capital; but the making interest bear interest is so far reprobated, that it cannot be introduced even by a previous pactio of the parties themselves.

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the Company.

Interest already due may be accumulated into a new capital, by a bond of corroboration: But this is an effect, which, strictly speaking, the law never performs. It is said that interest is accumulated into a principal by adjudging, and it is no doubt true, that when the estate is able to pay, an accumulation does take place in virtue of special statutes: But there is still no accumulation, no constitution of it as a debt against the debtor. All that the law does, is to declare, that the lands shall not be redeemable without payment of the accumulated sum; but if the debtor does not redeem, no claim lies against him nor against his other funds, for this accumulated sum; in every other respect, but as a burden on the subject adjudged, the debt remains as it was, and, by the bye, it was with a view to favour the debtor that this accumulation took place; it was by the act 1621, that adjudgers were forced to account for their intromissions, before that period they possessed without accounting; and when this change took place, it was thought reasonable, that the accumulated sum should be made a burden on the lands. This enactment was confirmed by the act 1672, but there is no statutory authority for a second accumulation at the date of the sale of the lands.

The creditors rest their claim on a practice which has crept in, of dividing the price of an estate sold judicially at the term, from which the principal bears interest, which, in effect, gives an accumulation at that period. But, by the common law at the time when the anticipated sales of the Company's estates were authorised, the sale could not proceed until the ranking of the creditors had been completed; so that there could be no accumulation until the conclusion of the ranking concurred with the actual sale, to lay a foundation for it. Such a prac

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tice, therefore, though well founded; could never support a claim for accumulation in the circumstances of this case, where most of the debts are not yet liquidated.

In opposition to the claim, the Company shall maintain these two propositions: I. That, had the general law allowed the sale to precede the ranking, there could have been no accumulation at the date of the sale, or at the term of payment of the price, upon sound legal principles. II. That, in the present case, the claim of accumulation, at the date of the sale, is excluded by the terms and nature of the statute, in virtue of which the sales were made at an earlier period than was allowed by the common law.

I. The debts for which creditors are entitled to draw payment, in virtue of judicial sales at their instance, are such as are secured by voluntary investment, or by adjudication; neither of these securities make any alteration on the debt. The infester's debt affords no claim for more than principal and interest, and the adjudger's debt remains the same, with this statutory privilege, that the lands shall not be redeemed without payment of the accumulated sum, with interest upon that sum. The raising the summons of sale makes no change on the debts; neither does the sequestration, nor a decree of ranking, nor even the sale itself. There is no innovation, nor any delegation of the purchaser in the place of the original debtor. The debt remains after the sale just as it was before.

If an infester or adjudger, after the creditors have been ranked, and the estate sold, but before a division, shall discover a separate fund belonging to the debtor, he may attach it for his payment; or if by succession, or otherwise, the debtor, though once bankrupt, comes to be in affluent circumstances, the creditor could not be barred from compelling him to make immediate payment. And, on the other hand, the debtor who finds himself in a situation to offer payment to the infester, of his principal and interest, or to the adjudger, of his accumulated sum and interest, should make such offer, it does not occur upon what ground the creditor could make any further or greater demand.

With these views of the rights of debtor and creditor in a ranking and sale, it seems difficult to discover the principle upon which an accumulation, at the term from which the price bears interest, can be founded. Were these adjudications with expired legals, there might be room for it. The possession of the purchaser might be considered as the possession of the adjudger, and the possession of an adjudger, after the expiry of the legal, has been found to extinguish the debt. But upon this principle the accumulation would take place at the date of the sequestration, when the possession commences, and it could

could not be extended to infesters, or to those adjudgers whose legals are not expired; neither could it have any place in modern rankings, where scarce such a thing as an expired legal ever occurs. It is possible, however, that this idea of the rights of adjudgers might have contributed to introduce the practice of dividing the price at the term of payment.

In all likelihood, however, the practice was introduced by the accountants, as it tended to facilitate the business of calculation; and when the ranking was closed before the sale, it might appear very natural to such as regarded the ranking and sale alone, without taking a wider view of the true rights of the debtor and creditor.

But though the idea was plausible, it was not legal, nor, upon a more enlarged view of the matter, agreeable to sound equity. The debts were always to be considered as debts, and the ranking and sale as one method of paying them off; there could be no accumulation of the debts, nor was this the idea upon which the practice proceeded: but it was supposed that a proportion of the price would have fallen to each creditor at the time it became payable, so that each was entitled to the interest which grew upon his share. But this could not be, without an actual imputation *in solutum* of the debts, and a consequent extinction of the whole or of part of the debts; and here lay the error of the practice, which, however, could have no very observable effect when the interval was short betwixt the sale and division.

The act 1681 cannot be resorted to in support of this practice; for all that that statute does, is to direct, that in general the debts should be paid out of the price, and there is not the least hint of an accumulation at the date of the sale, or term of payment; on the contrary, it is the period of actual distribution to which the statute refers.

The Company would therefore be well entitled to maintain, that this practice of accumulating at the term of payment of the price, even when the ranking preceded the sale, was erroneous: nor could the length of time sanction the mistake, seeing that the Court have corrected several errors which had been fallen into in rankings, though of equal standing. Thus, prior to the 1747, and as far back as it could be traced, it had been the constant practice to rank inhibitors, so as to make them draw proportionably from all the posterior creditors; and this had been solemnly approved of by the decision in the ranking of Nicolson's creditors in the 1697; but in the ranking of the creditors of Whitehaugh, in the 1747, this erroneous practice was altered, and the claim arising on an inhibition was laid upon the postponed creditor. In like manner, it had been the practice down to the 1754, to lay the expence of the ranking and sale proportionally on all the creditors:

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tors: But, by an act of federunt in that year, the expence was ordered to be taken out of the first of the funds, by which means the expence fell upon the postponed creditors alone.

But it would not affect the argument of the Company, although this practice was held to be right, when the ranking precedes the sale. It is enough for them to make out, that there can be no foundation for it where there has been no previous ranking; and here the Company have no practice to combat.

Every thing that has been suggested against an accumulation upon a sale, after the ranking, applies with double force when the sale precedes the ranking. Where the ranking is previously concluded, then, as soon as the price exists, the right of every creditor, and, in some sense, his share of it are certain; and it requires nothing more than the application of figures to make it liquid: But where the sale precedes the ranking, all is reversed; it is impossible to know who has any right until the creditors are ranked, the creditor is not in readiness to take his payment, though there should be a fund ready to pay him with; and therefore he can have no just claim to accumulations.

This matter may be considered in three views: 1. With respect to the interest of the debtor: 2. The interest of the creditor: And, 3. The interest of postponed creditors. And in all these views it will appear that there is no just foundation for the accumulation.

1. In considering the right of the debtor, it will be kept in view, that a ranking and sale does not imply an absolute insolvency, for it may proceed although the value of the lands exceeds that of the debts. Thus, in a case observed by Fountainhall, 3d July 1705, Hope v. Gordon, and abridged in the Dict. Vol. II. p. 310. five parts of six of the price put on the lands by the Court were sufficient to pay off the debts, and the rents were also more than sufficient to pay the interests, yet the Court found, "That the debtor was *operatus* and "Insolvent, and the estate bankrupt." The debtor also, although insolvent, may acquire funds sufficient to render him solvent; and whatever rule is just, must be so in all the cases to which it can be applied.

Now, suppose a debtor to be in the situation of the debtor mentioned in this case collected by Fountainhall, and that there is one of his creditors whose claim is not liquidated till after a dispute of some years, with what justice could this creditor demand an accumulation of his debt, at a period when he did not know its amount, and when the debtor could not have paid the debt had he been ever so willing: where a creditor does not receive his payment, only because he cannot show

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what is due to him, he can have no just claim to interest upon interest.

When the sale precedes the ranking, during the space betwixt the sale and the ranking, the debtor remains exposed to the diligence of his creditors; and, supposing him to have been incarcerated at the instance of one of his creditors, who is found to have a preference on the price, according to the argument of the creditors, this creditor is entitled to his accumulations: But surely it would be contrary to every idea of law and justice, to give this creditor the benefit both of the accumulation and of the personal diligence, as the accumulation is founded on the supposition of his having a right to a share of the price in extinction of his debt, whereas the diligence must proceed on the supposition that the debt was still in existence.

In like manner in the case of the bankrupt's acquiring other property, it would be unjust to allow a creditor to attach it in payment of his debt, while, at the same time, he claimed his accumulations in consequence of the previous sale, and on the footing that his debt was thereby extinguished; the same absurdity arises here, of holding the debt to be satisfied, and not satisfied.

2. With regard to the creditor, if he gets his accumulation on the footing, that a certain part of the price comes in place of the debt in whole or in part, he must take it with this consequence, that he can get no more interest than what grows on his part of the price. Now, suppose that the price yields only 3 *per cent.* and that there is a preferable creditor entitled to draw his full payment, he would certainly object to receive only 3 *per cent.* and the Company cannot see how he could be compelled to accept of it; but unless he can be prevailed upon to take less than was due to him, the other creditors cannot draw their interests, and of course the principle of accumulating at the date of the sale must be given up.

The creditor who may ultimately be preferred, *primo loco*, may not have made his appearance in the ranking for years, and he may have, in the mean time, drawn his interest at 5 *per cent.* from other funds, or from a co-obligant, how is this man to be reduced to his 3 *per cent.* upon his being preferred in the ranking?

Again, suppose that the common debtor becomes possessed of funds, in the interval betwixt the sale and the division, it may be the interest of a creditor rather to recover his principal and interest instantly, than to wait the issue of the ranking; nor could he be barred from such recovery: and thence it follows, that he never had any right to an accumulation, these two rights being incompatible.

Further, the purchaser at a sale may become insolvent, and at a second sale the subjects may bring a less price; or, consisting

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sisting of houses, the subject may perish by fire, it would then be the interest of the creditors to maintain, and they undoubtedly would be entitled to maintain, that the price which the purchaser was bound to pay, could not be imputed in satisfaction of their debts, which remained undiminished; but this they could not have maintained if they had such a right to the price as to have entitled them to an accumulation.

3. The interest of the common debtor is affected by any undue accumulation given to the creditors; for, if there be no reversion, it keeps up a larger balance against him, if there be a reversion it must diminish it, where there is no reversion it affects also the postponed creditors.

The accumulation of interest into a capital is prejudicial to the postponed creditors, and the more so, the greater distance there is betwixt the time of the sale and of the division; it is on this footing that they have a title to object, if there be no legal foundation for the accumulation.

Keeping it in view, that the claim of accumulation arises not from any change on the debt, but from the creditors having right to a certain proportion of the price, the injustice of it will appear from the following consideration. If, in the course of a ranking, part of the fund should be lost, the creditors first in order would still draw their full payment, though the posterior creditors (who would also have drawn full payment had there been no loss), should be cut out entirely; thus the preferable creditors hold a right over the whole price, although their title to accumulation is founded on their supposed right to a certain specific part of it.

Let it be supposed, that a subject worth L. 1500 is sold in three lots of L. 500 each, and that three creditors, A. B. and C. are ranked upon it, in the first, second, and third place; but, before the division, the purchaser of one of the lots fails, and the lot becomes worth little or nothing, C. will be entirely cut out, and A. and B. draw their debts: This is unjust; for had the lots been set apart from the first, then the hazard would have been equal; but, in the argument maintained by the Company, A. gets an accumulation, because the division is held to have taken place, and C. runs the risk, because in fact the division did not take place, at the date of the sale.

Again, if the subject has been sold in one lot, and the purchaser had failed, and a second sale produced only L. 1000, while the interim interest has been lost, there also C. runs the hazard, A. draws alone his full payment, for B. loses part of his debt.

And this suggests another objection; for the preferred creditors would be entitled to say, there shall, or there shall not be an accumulation, just as it suited their interest. In the case  
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which has been put, if A. claimed his accumulation at the date of the first sale, he would lose his intermediate interest, and therefore he would object to such accumulation, and claim to be ranked for principal and interest, at the date of the second sale; but then, if he can do so, it follows, that he had no right originally to an accumulation.

In multiplepointings no accumulation has ever been thought of; but if there be a ground for accumulations, at the date of judicial sales, there is equally so for an accumulation at the using of the arrestment, or the raising of the multiplepointing.

The creditors have said that their claim is equitable, and they put the case, that the price was precisely equal to the principal and interest then due, and then ask if it be just that the debtor should, by the lapse of a few years, have a reversion which did not formerly exist; but the creditors might, with equal justice, fix on any period of the life of their debtor, at which the same situation had occurred, as the period from which the accumulation ought to have taken place. Indeed, it is not any fancied equity that can entitle a creditor to claim interest on interest, some legal ground must be shown.

Let this case, put by the creditors, be reversed, that the estate was more than sufficient to pay the debts, but by the rents falling short of the yearly interest, the debtor is deprived of this reversion, would he be allowed to say, that because part of his estate was once sufficient to pay his debts, no more of it can now be claimed by his creditors?

If it should be said, that the creditors have a lien upon the price, and consequently a right to the profits to the extent of the by-gone interest, as well as of the principal, and therefore a right to have their debts accumulated from the time the price bears interest, the Company can neither admit the premisses nor conclusion. Were such a consequence to follow a right in security, it would lead to an accumulation, not at the date of the sale, but of the summons of ranking and sale, or rather indeed of the several securities. But the Company shall at present compare only, an accumulation at the date of the summons, with one at the date of the sale.

The creditors have a proper lien on the lands, and it may be shown, what were their several shares of these lands at the date of the summons, as well as their shares of the price at the date of the sale; and therefore, according to the reasoning of the creditors, the accumulation should be at the date of the summons. Thus, each would have his share of the rents before the sale, as well as of his interest after it, as the debt stood at the time when the summons was executed.

But after, as well as before a sale, it is a lien or security upon the lands, not upon the price which each creditor holds: the

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right to draw from the price is only consequential, the security upon the land remains fixed until payment be made; but whether a creditor shall draw any share of the price of a particular sale is uncertain to the last. Every sale is conditional, the subject is conveyed to the purchaser only upon his making payment of the price, when the purchaser fails, the creditor has nothing to do with the price, the sale becomes void, and the lands are exposed of new.

Neither is it of the nature of a right in security, that the profits of the subject should be substituted in place of the interest of the debt, and such a change would often be prejudicial to creditors.

The practice has been founded on by the creditors; but in every instance, the accumulation has been after the ranking, whereas the creditors are demanding an accumulation previous to the ranking; and whatever reason there is for making an accumulation, at the date of the sale, where the ranking has preceded, the same reason points out the date of the ranking as the proper period, when the sale has gone first.

The practice between the 1681 and the 1695 was short, and it is believed to have been various. There may have been a virtual accumulation in some instances, but in others there were none: Thus, in a case collected in the second volume of the Fac. Coll. 7th January, 1757, *Middleton v. Falconer of Monkton*, it appears, that the lands were sold before the 1695, and the division took place in the 1697; the order on the purchaser was, to pay to the creditors their principal sums, with interest until payment. It was this circumstance, which gave rise to the question; Dr. Middleton, who had right to one of the postponed debts, having pursued the heir of the purchaser for payment, the heir contended, that in accounting for the price, he was entitled to accumulate each debt at the date of the sale, whether the creditors received their payment in that manner or not, and that by stating the account in this way, there remained only a balance of L. 252 Scots in his hands. But the pursuer was found entitled to insist, that the principal and interest due to the creditors, (and which alone had been paid by the purchaser,) could be taken credit for; and in that way there remained a balance in the hands of the purchaser of L. 8940 Scots.

But whatever the practice prior to the 1695 may have been, the commissioners who framed these regulations, showed clearly, that they did not approve of any accumulation prior to the ranking, by appointing the ranking to precede the sale.

As the regulations 1695 did not extend to rankings and sales at the instance of apparent heirs, the sales there have commonly preceded the ranking; and the creditors have referred to the case of *Invergordon*, pronounced in the 1755, whereby it was found, that

that notwithstanding the sale's having preceded the ranking, there should be an accumulation at the date of the sale. But this decision, and the practice which is said to have followed upon it, are not in point; they relate to rankings and sales of a different nature, and regulated by different rules.

A sale at the instance of an apparent heir, is held to be an adjudication for behoof of all the creditors; and accordingly, in a sale of this kind, within year and day of an adjudication, the Lords preferred the whole of the creditors *pari passu*, though their debts were merely personal before the sale. Kilkerran and Falconer, January 29, 1748; Sir William Maxwell v. Irvine and Rome. Lord Kilkerran observes, after stating this case, "That the Lords considered the decret of sale as an adjudication for the benefit of the whole creditors, being obtained by the apparent heir, who was empowered by law to act as trustee for them and himself, and that being within year and day of the first adjudication, it ought to be beneficial to all the creditors, whether they have adjudged or not." The sale being thus held to be an adjudication, it might be thought to follow of course, that it should entitle the creditors to the same accumulation that ordinary adjudications do. But in sales at the instance of creditors, the sale is so far from being considered as an adjudication for the creditors, that a creditor, whose debt happens to remain personal at the date of the sale, must still lead a separate adjudication for himself, in order to be entitled to any share of the price.

The decision, therefore, in the case of Invergordon, and any subsequent practice in sales at the instance of an apparent heir, can be of no authority in a question with respect to a sale under the act 1681.

Even were this question to be taken up as a general one, and determined upon general grounds, applicable to rankings and sales, where the sale precedes the ranking, in virtue of a general law, it is submitted, 1. That the question remains perfectly entire, to be determined as shall appear most agreeable to just principles. 2. That there is no legal principle which could warrant an accumulation at the date of the sale, where it is made previous to the ranking; and that there ought either to be no accumulation, or none till the period when the ranking is closed, as well as the lands sold.

II. The sales in this case did not proceed upon a general law, but upon a private act passed at the time, when, by the public law, no sale could precede the ranking; the Company do therefore maintain, that the claim of accumulations are excluded, from the sales having proceeded on an act made *pendente lite*, and containing no warrant for any accumulation

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earlier than it could have taken place in the common course of law.

*Nihil innovandum pendente lite*, is a general maxim of law that has always been respected by the legislature. Parliament could not mean, therefore, by passing the act 1777, to alter materially the state of the parties, or to introduce any thing which might prejudice some of the parties and benefit others. Unless, therefore, words can be found in this act to the contrary, it must be held, that the legislature did not mean to introduce an accumulation at an earlier period than what would have been done by the common law; although therefore this act has authorised the sale before the ranking, it does not follow that it has authorised accumulation also; it has not said so.

From the preamble of the act it is obvious, that the legislature had no intention of creating an accumulation at the date of the sale. There is authority given for warrants, but these are equivalent to a decree of ranking, in favour of the creditor who receives them. But the words of the act direct “a warrant to be granted for payment of such sum or sums of money, as is, or are, or shall be found due to such creditor or creditors.” And as nothing more can be found due to him than his principal and interest, he can demand no accumulations under this act.

It is the payment of the creditor that the act speaks of; but no hint is given of a previous accumulation by these warrants, the creditors receive payment, which is equivalent to accumulation. It does not occur, therefore, what title the creditor has to a previous accumulation, when the act makes no mention of it.

Further, the judicial factor is ordered to lend out the interest of the prices, so that it does not remain in the hands of the purchaser, and could not be meant to follow any part of the price, as an accessory.

The Company shall not canvass the clauses of this act more minutely, but shall repeat what they formerly stated, that the legislature could not mean to give an earlier accumulation of the debts, than would have been given by the general law.

Opinions.

Lord Justice Clerk.—It is not the idea of the law that a decree of sale has the effect of accumulating the debts of the creditors. What I found my opinion on is this, that the moment the estate is turned into money, the creditors have a right *eo ipso*, to draw their share of the price: and the idea of the law is, that the preference and order of ranking is established before the sale, and although a few months are given for the payment of the price, and it happens that a division turns into a ranking, yet this is not the idea of the law, for the scheme

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scheme is nothing more than the mere operation of figures. Each creditor draws from the purchaser, and is creditor to him for the precise sum that arises to that creditor at the date of the sale. I see a mistake runs through the information for the Company. It is there laid down, that the person ranked *primo loco*, in the event of a loss, draws his full payment, and the loss falls on the postponed creditors. But this I deny, the person ranked *tertio loco*, has the same right to whatever share of the price he was originally entitled to, that the person has who is ranked *primo loco*; and a loss when it happens, will fall proportionally on all the creditors. On that idea I decide, that at the date of the sale, the creditors have each a right to a certain part of the price; and the scheme makes the price divisible as at the date of the sale: What is the consequence of this, if I am a creditor, and in the scheme of division have a right to draw L. 1000 of the price of the estate, but, by a private dispute, I am deprived of the money, and prevented from drawing it for ten years; who is to receive the interest of this money in the mean time? it cannot surely go to increase the funds of the postponed creditors; I understand such a claim, therefore, to stand on the right which the creditors possessed at the date of the sale; when the price does not pay up the whole debt, the balance remains a debt against the debtor. It commonly happens, that the price is exhausted by the securities affecting the estate; but when there is a balance of the price over this, it is attachable by the adjudications of the personal creditors; and these creditors draw not only the reversion, but the interest arising on it.

Lord *Dreghorn*.—It was under the authority of the act of parliament that the sale proceeded. Now the act expressly says, that it was not intended to make any change on the ranking. But from the terms of it, his Lordship had difficulties.

Lord *Justice Clerk*.—To remove these difficulties, observed, that to make the sale precede the ranking, does not alter the interests of the creditors; it may be of use, in so far as it raises the income of the property by the advance of interest over the rents, but never could be intended to deprive the creditors of their just rights.

Lord *Rockville*.—Thought it extraordinary, that postponed creditors should acquire by delay a right which otherwise they would not have had.

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Lord *Eskgrove*.—Ultimately I come to the opinion delivered by the other judges; formerly, when the ranking preceded the sale, a creditor for L. 500, whether it consisted of principal or interest, had his money the moment the sale took place. If this was the case, while the ranking preceded the sale, why should it alter the case, or deprive the creditors of the interest of his share, that the sale precedes the ranking? The moment the estate is sold, the creditors have a right to the price, and you grant a warrant for payment of a preferable debt, principal and interest, why should a creditor be worse off who has no warrant?

Lord *President*.—After the ranking had depended for such a length of time, the act did right to bring on the sale; and when the sale took place, the creditors had a right to draw their shares. The question is for the accountant, how shall the price be applied to the principal and interest due to the creditors? Now it is a rule established by the Court, that the price with the interest accruing upon it, is a fund divisible among the creditors; each being entitled to his share according to the whole amount of his debt, as at the period when such fund began to exist, and every accountant made his scheme of division in that way betwixt the act 1685 and the 1695; and from this last period down to the 1783, although a ranking had continued for years, it was the practice for the accountant to carry back his scheme of division to the date aforesaid. The case of sales by apparent heirs seems to be attended with more difficulty: But there also the same rule has been followed. In the 1783 sales at the instance of creditors were made to precede the ranking; from that period, the same practice has been continued.

Judgement.  
Nov. 15, 1791.

“ Having resumed consideration of this petition, with the  
“ answers for the York-buildings Company, and the memo-  
“ rials given in for the parties, in consequence of the above  
“ interlocutor; find, that the price of the estates, with the  
“ interest produced therefrom, is a divisible fund, to be ap-  
“ plied to the payment of the creditors as they have been or  
“ shall be ranked; and that the account of their debts must  
“ be taken, and the application of their dividends made, as at  
“ the period when the price began to bear interest; the whole  
“ sums due to them, whether consisting of money bearing in-  
“ terest or no, being stated in said account, as a capital at  
“ that period, according to the rules which have been usually  
“ observed in other judicial sales, at the instance of creditors,  
“ and

“ and in sales at the instance of apparent heirs; and remit to  
“ the Lord Ordinary to proceed accordingly.”

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Mr. M'Intosh went over the subject at great length, and argued the hardship of giving interest on claims which were not liquidated at the date of the sale. He considered a scheme of division as perfectly unnecessary; that on the sale the money ought to be paid over the table to the creditors: It lay ready for them, and if it was not paid, it could be owing only to a creditor's not having proved his debt; a neglect for which he alone was to blame, and for which the loss of interest was the proper punishment.

Lord *Monboddo*.—His Lordship said that he thought very highly of the petition; but that the answers put the matter on a clear footing: His Lordship was therefore of opinion with the interlocutor.

Lord *President*.—Are any of your Lordships of a different opinion?

As none of their Lordships were of a different opinion, the Court adhered.

For the Company, M'Intosh, M Ross,  
and Cha. Hope,  
Creditors, A. M'Conochie and  
Alex. Abercrombie, } Advocates.

G. Johnston,  
W. S.  
A. Swinton,  
W. S. } Agents

Inner House.

Colquhoun Clerk.

Vol. XI. No. 2.

RE TEN-

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## R E T E N T I O N

I. The Trustees on the sequestrated estate of WILLIAM HARPER Merchant in Glasgow, Pursuer,

AGAINST

ANDREW FAULDS Bleacher at West Arthurlie, Defender.

When materials are delivered to a manufacturer, to be wrought up, he is not entitled to retention of them for any other claim, than the expences of manufacturing them.

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WILLIAM HARPER dealt extensively in the linen trade, and was in the practice of sending great quantities of cloth to the bleachfield of Andrew Faulds. The accounts betwixt Harper and Faulds were settled annually at the term of Candlemas. The last settlement took place at Candlemas 1789, when the balance in favour of Faulds was L. 105 Sterling, for which he received Harper's bill, payable on the 7th June following. At this time there were no goods in the hands of Faulds; but on the 24th of March, and in the months of April and May, there were several parcels sent to the field: The last parcel was sent on the 16th May; and on the 25th, Harper failed, and a sequestration was awarded against him.

The trustee under the sequestration, desired Faulds to deliver up to him the linen which had been sent to the field, and offered him payment of 17 l. 6 s. 10 d. Sterling, the charge for bleaching it. But Faulds claimed retention of the goods, not only for the 17 l. 6 s. 10 d. Sterling, but in security of the L. 105 Sterling, the balance of the former year's account.

This question was brought into Court, in the form of an advocacy from the sheriff; and the Lord Justice Clerk, before whom it came as Ordinary, having taken the cause to report, upon informations, the Court, with a view to fix the point of law, ordered a hearing in presence; and the following arguments, all drawn up from the pleadings and printed papers in the cause, without adhering rigidly to either.

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Retention may be considered under the following arrangement.

- I. As occurring betwixt mutual debtors.
- II. As occurring with a person *vergens ad inopiam*.
- III. As occurring with a trustee on a bankrupt estate.

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Argument for  
the creditor  
claiming retention.

I. Compensation and retention, or the right which a creditor has of retaining the money or effects of his debtor, until he receive payment of his debt, is founded on the clearest principles. It is no doubt variously modified by views of expediency; but the general principle remains: In this country it is fully acknowledged.

To discover the dictates of natural law upon this question, we must go back to an early stage of society; and if we suppose that in such a state two men happen to be possessed each of the other's bow, can we believe that one of them would be thought entitled to demand his own bow, at the same time that he retained his neighbour's? there could be no period in which mankind were so blind to the rules of natural justice, as to admit of such a claim: and the question is the same, whether we suppose the parties to have been possessed of each others bows, or that the one held the bow and the other the shells of his neighbour, or whatever in that early age was the instrument of commerce. Courts of law are introduced not to destroy natural rights, but to enforce them; and at every period where two parties appeared in Court, with counter-claims, to neither of which lay any objection, the judge must have sustained these claims, and sent the parties out of Court by one judgment.

How then can it be said, that compensation and retention were unknown in our law till the 1592?—The statute of that year, which has been referred to, was meant to regulate, not to introduce the practice, and to authorise judges to admit the plea in the form of an exception, which could formerly be admitted only as a counter action.

In the progress of society, many limitations will be imposed upon this general principle, and these may be arranged under the following heads: 1. The nature of the possession. 2. Express agreement. 3. Presumptive limitation. And, 4. Statutory limitation.

1. Possession must be lawful in order to found this right of retention; for, even in the rudest times, a person who has acquired possession of his neighbour's property, by fraud, or by force, will not be allowed to retain it on the footing that the proprietor is his debtor. A man cannot take advantage of his own crime even for the purpose of doing himself justice: But where the possession is legal, and with the consent of the proprietor, then the plea of retention is competent.

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2. Express agreement will undoubtedly exclude retention. If a creditor receive a loan of his debtor's horse, under the condition that he shall return the horse, against a certain time, without claiming retention of him, there can be no right of retention. Or, if John borrow an article from James, to be returned at the end of a month, and James borrow one from John, to be returned at the distance of a year, John cannot retain the article which he borrowed, on the footing that James still retains an article of his. This claim would be in the face of his own agreement.

3. Presumptive limitation may be inferred from the nature and circumstances of the transaction. Thus, where a subject is delivered to the charge of one, from motives of friendship, or in trust, he is bound in honour not to claim a right of retention. In the common contracts there is a mutual advantage stipulated, the object of both parties is gain, and there is much hardship in forcing the one to pay, or to perform, without allowing him to set off the claims which he has, in opposition to the demands that are made upon him. But when one deposits a subject with his friend, trusting to his honour for the safe delivery of it on demand, there is that *uberrima fides*, which must prevent any sordid views, on the part of the depositary. Similar to this is the obligation on a person, who, as a friend, obtains the loan of a subject: The favour proceeds from friendship; all view of gain is excluded, and the borrower is bound to restore the subject whenever it is asked.

4. Statutory limitation may be necessary to restrain this right in particular cases, from views of expediency, or of commercial advantage, in the same way that other general principles of law are modified by circumstances.

Under these limitations, then, we shall find that the right of retention existed in the Roman law, and now exists in the law of this country.

ROMAN LAW. The existence of the general right of retention in the Roman law, independent of particular hypothecs, will not be disputed, and therefore need not be proved from particular laws; it will, besides, be sufficiently established in considering the limitations admitted in that law.

1. It has been shown, that retention can never be admitted where the possession is obtained *mala fide*. Voet says, "In causis quoque momentaneæ possessionis compensatio improbatæ fuit quoties quis possessionem alienam rapina, furto, vel aliter, perperam occupavit; cum spoliatus ante omnia restituendus sit, L. ult. § ult. C. h. t." But so completely is retention received in our law, that even this principle, strong as it is, was departed from in the case of Magbiehill, and retention was allowed on a possession acquired by an act of illegal diligence.

2. Re-

2. Retention was denied in the Civil law, when inconsistent with the nature of the contract; as in deposit, and in all the gratuitous and confidential contracts. To take the instance of deposit.—As defined by Voet, (Lib. XVI. tit. 3. § 1.) it is a contract, “*bonæ fidei ac re constans quo res alteri gratis custodienda traditur, ea lege, ut quando cunque restituatur eadem in specie.*” It is a contract of friendship alone; no mercenary views are admitted. It is a contract of trust and confidence on the one hand, of friendship and honour on the other; and the obligations, which the depositary is bound to, must be performed with that nice and scrupulous exactness which honour ever requires: The deposit must be restored the moment it is demanded. This is laid down clearly by Voet, who gives this reason for it, “*Cum enim solius ver-* Lib. XVI. tit. 3. § 9.  
“*tatur deponentis utilitas, neque ullum depositario ex repetitione maturiore generetur præjudicium, sed magis ipse ab onerosæ custodiæ liberatur necessitate—merito scriptum fuit hoc ipso dolum facere eum, qui suscepit depositum, quod vel statim ab initio reposcenti rem non reddat, L. 1. § 22 ff. h. t.*”

This shows Voet’s opinion of the general right of retention; that it is limited only by the particular nature of this contract, and that in common contracts it exists unlimited. Voet, in another part of the section, says, that retention is not competent in this contract, even “*ob impensas, in ipsam rem depositam, factas.*” The limitation of the right, in this particular case, is well laid down in L. 11. C. *Depositi vel contra.*

A similar limitation took place in the Roman law with regard to *commodate*: it is like deposit, a contract of friendship, gratuitous, *bonæ fidei*, and confidential; there is no room for a count and reckoning, the subject must be restored with scrupulous fidelity. If a man had borrowed his friend’s coach and horses to go a journey, he would have been deemed infamous had he claimed retention of them for debt previously due. This doctrine is accurately stated by Voet, Lib. XIII. tit. 6. § 10, where, after stating the gratuitous nature of the contract, he assigns this reason why retention was not allowed: “*Et sane perquam durum fuerit, commodanti, qui per commodati concessionem beneficium commodatario prestare intelligitur, (juxta L. 17. § 3. h. t.) hanc referri beneficii accepti gratiam, ut quæsito impensarum factarum colore defraudaretur in posterum rerum suarum fruitione per retentionem ab eo factam, cui ulterius utendi jus non est. Quin et quæ rationes pro eo adducuntur, ne in deposito compensatio admittatur etiam pro retentionis exclusione in causa commodati stringunt, dum non minus, imo magis fidem frangit, qui accepto ac finito beneficio non reddit quod se restitutum promiserat, uti id in commodato contingeret, quam qui nullo accepto be-*”

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“tione reddendæ restitutionem; quod in deposito fieret.” So strongly was retention established in the Roman law, that even in this contract retention was originally allowed for the expence laid out on the subject by the *commodatarius*; and it was not till the reign of Dioclesian and Maximinian, that this peculiar contract was freed from this claim of retention. In short, by the Roman law, retention was excluded only in such contracts as those that have been mentioned, where the peculiar nature of the contract, the absence of all patrimonial interest, the seclusion of every thing like an accounting among the parties, took away all possibility of retention: But, in all onerous and sordid contracts, the case was very different; in these there was room for a count and reckoning, and retention was allowed to the fullest extent, not only for expences and debts arising out of the contract itself, but for all debts of whatever origin. In treating of the particular contracts, as location, pledge, &c. Civilians speak chiefly of the retention for expences, &c. arising out of the subject: and this is easily accounted for: In the 1<sup>st</sup> place, That kind of retention is the most common, since it is probable, that in most cases where a contract is entered into, the person getting the goods into his hand will have no other claim than that which arises from that particular contract. 2<sup>dly</sup>, The more extensive claim of retention naturally occurs as a general right to be treated of in the title of compensation and retention. The contract of *locatio conductio* is onerous, there is no sentiment to stand in the way of the common law right: A count and reckoning takes place, and retention is admitted in its full extent. A count and reckoning is the subterfuge by which the retention competent to a factor is attempted to be explained as something peculiar: But it occurs naturally in every onerous contract where there are claims to be set against each other; for, in accounting to each other, the parties naturally think that this is the time for settling all debts. Suppose that each party brings his action, so that neither can object that retention is not pleadable by exception, decree would not be given *hinc inde*, the actions would be conjoined: Here then is retention in effect. It has been said, that Voet, in § 32. Loc. Cond. denies the right of retention to the conductor; but this applies only to the conductor claiming on pretence of the subject being really his property. He must first, says Voet, restore the subject, and pursue for it as his property; for the receiving of the subject as conductor, is an acknowledgment that he is not proprietor, and he will not be allowed to invert the ground of his possession: It comes to the same case with acquiring the possession by fraud and violence, and then insisting to keep it as his property. It is also said, that the only retention which Voet acknowledges is, that  
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for the expences ; it is very true, he speaks of nothing more in the title *Lac. Cond.* but in the general title, *De Compensationibus*, where the great right of retention comes to be spoken of, he states it as extending to every debt. After mentioning the nicety of the Roman law, which permitted not fungibles of incongruous natures to compensate each other, as wine and oil, &c. he adds, “ Cum compensatione non confundendum jus retentionis, licet in quibusdam, compensationi haud sit ab simile, ac compensationis exemplo etiam in executione opponi possit. *Ant. Faber. Cod. Libr. VII. tit. 22. defin. 12.* “ Nec recte dixeris retentionem cessare quia cessat compensatio, cum retentio locum habeat etiam in corporibus compensationem non admittentibus, ac in debitis etiam non liquidis admitta sit.” This is a very strong authority in favour of the general right of retention, and seems to root up at once the argument from expediency ; it gives retention even for illiquid claims which must have the effect of hanging up manufactures till these claims be determined. If a man puts goods into my hands, and demands them back while he is unable to pay me what he owes, he is dishonest ; if he be able he should pay me : Now, however one may incline to dispense with this in the common case when the debtor is solvent, he must be allowed to insist for it when the debtor becomes insolvent ; and the debtor can have no interest to object to the hiring out of a subject under such possibility of retention, since, by his insolvency, his hands are at any rate tied up. But even this distinction, between the case of a solvent, and an insolvent debtor, the Roman law did not make.

The Roman law allowed retention, in the case of *Pignus* also ; and this is a very strong instance, for by impledging a subject specially for a particular debt, there seems to be an understanding between the parties, that it shall not stand as a security for any other. By the Roman law, a pledge could be retained for all debts whether contracted prior or posterior to the impignoration, and this on the principle already pointed out, that this contract, onerous on both sides, naturally leads to an accounting, in which a balance is struck, and things remain as they are, until the balance be paid over. The following text proves that the creditor *Pignoratitius*, had this power of retention : *L. un. Cod. Etiam. ob. Chirog. Pignus teneri potest.* See also *Perezius's Commentary* on this Law, *Lib. VIII. tit. 27. § 2.* This has been said to prove, that whatever might have been the law, in a question with the debtor himself, retention has no effect against his creditors. But the true meaning of the exception of the *secundus* creditor is, that the right of retention was effectual except against a real lien, constituted over the subject in favours of another creditor ; for the *secundus* creditor is a person having a *real security* over the subject ; these securities could, by the Roman law

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law, be constituted without possession, as effectually, as an heritable security can be by our law. Perezias explains what the nature of the *secundus* creditor's right was. It is further explained by Voet, Lib. XX. tit. 6. § 15, 16. See also, L. 8. tit. 18. Cod. L. 1. and 5. Now, the exception of such a creditor rather confirms the general rule, that in a question with the debtor himself, or with the other creditors, the creditor *Pignoratarius* had retention to the fullest extent.

This then was the law of Rome, that wherever there was no express contract, taking away the right of retention, nor any thing in the peculiar nature of the agreement necessarily implying a renunciation of it, nor a real lien constituted over the subject clearly preferable to the general claim of retention; this right was pleadable to the fullest extent, by every legal possessor of a subject, till all the debts due to him by the proprietor were paid; and this not only in a question with the proprietor himself, but against all his personal creditors.

The Roman law is of much weight in this question, not only as a wise and enlightened system, but as having been at one time, the common law of Europe, and at this day (unless when altered by particular regulation or usage) the law of this country in personal contracts; and it will not be difficult to show, that there is no principle in the law of this country that militates against that of Rome.

It is a ridiculous notion, that the law of compensation was introduced into this country by the statute 1592. That it was a doctrine of the Roman law, not rejected in this country, should seem sufficient refutation of this; but it will, besides, be remembered, that this is a right (as has been shown) founded on the first principles of justice and equity, since no man can force performance while he himself is unwilling to perform. When applied to a single contract this is self-evident, the obligations are equally strong against each: when applied to the whole transactions between the parties, the principle must be equally strong; for though, by the words of an obligation, a person may be bound to a particular act, equity must in all laws interpose to correct the glaring injustice of obliging one to perform, without at the same time forcing the other also to fulfil his part. "Placuit enim in omnibus rebus, precipuam esse justitiæ equitatisque, quam stricti juris rationem, L. 8. C. "De judiciis." Accordingly, Lord Kaimes, in mentioning those considerations, on which the strictness of interpretation is dispensed with, places retention in the front; Prin. of Equity, B. II. c. 3. In our law then, as in all other laws, and particularly in that of Rome, equity has introduced compensation and retention, which without circuitous litigation, enables a debtor to extinguish his debt by an equivalent sum due by him to his creditor. Compensation has, in our law, been limited

by the statute 1592, which seems to have been enacted for the purpose of ascertaining more accurately the nature of compensation, it gives to the judge a power of allowing compensation by way of exception, and defines precisely the cases where he may do so. An argument has been drawn from the expressions of this statute, to show that compensation owed its introduction in our law to that statute: But the only inference that can properly be drawn from that law is, that before it was made, there was no compensation by way of exception. It is plainly an act made to regulate the general principle which must exist in all laws. There are many such statutes made for the mere purpose of regulating pre-existing general principles of law, though they appear, *ex figura verborum*, to be as much introductory of a new right as this statute 1592. In the very next page of the statute-book there is a law respecting the expences of plea; that was clearly not the first introduction of the claim for expences. Retention was not, like compensation, limited by this statute, it still remains on the general principle, limited only by one or other of the four general considerations already mentioned; and indeed its effects may rather be considered as strengthened than weakened; it supplies in some respect the want of compensation; it exists now as a privilege (says Lord Kaimes) “to with-hold performance from the pursuer till “the pursuer, *simul et semel*, perform to him. This privilege is “exercised (he adds) by pleading it as an exception to the pursuer’s demand, and the exception from its nature is termed “retention.” Prin. of Equity, B. II. c. 3.

The existence of this right of retention, in our law, is acknowledged by all our authors. Thus,

STAIR, B. I. tit. iii. § 7. acknowledges the general right of retention: he is not very accurate, he speaks here like the Roman writers in treating of the different contracts; but he is sufficiently accurate for the purpose: he is giving an instance only, not making a restriction. We must presume Stair to have known and respected the Roman law, had he meant in this passage to restrict the right of retention, how could he overlook the *Lex. unic. Cod. etiam ob cibis*. &c.? He must have also been well acquainted with the several decisions to be afterwards mentioned, pronounced before he wrote, and very different from the example he gives; and could not have passed them in silence, had he not given his few cases as examples only, illustrative of his general doctrine.

BANKTON followed those who had gone before him; but he states very unequivocally the right of retention as competent for every counter-claim, B. I. tit. xxiv. § 34. and 35. He here gives two instances, different in nature: Had he conceived the right of retention to be limited to the case of expences, he never

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I.

ver would have stated it as applicable to debts of the greatest consequence.

ERSKINE admits the general right of retention, B. III. tit. iv. § 20. Here the general right is laid down; and, in the next section, particular instances in the strongest cases are given of it, not restrictive, but illustrative. It is indeed impossible that he could mean to limit the right of retention even to the extent which he has mentioned; he speaks of retention by a factor for his disbursements, but it is acknowledged on all hands that a factor has retention for all debts; and a writer can retain for all accounts of business, however unconnected with the papers in his hands.

Our authors then acknowledge the right of retention; not that narrow right only, which is contended for on the other side, but a right of a more general and broader kind, which they illustrate by particular striking instances, very different in degree. How hard would otherwise be the situation of a creditor who happened to be possessed of funds of his debtor? *Beati sunt possessores*, says the Civil law; but were there no such thing as retention, a creditor in the possession of effects would be in a worse situation than any other creditor; he can neither arrest nor point in his own hands: he may assign, perhaps, but still this loads him with an expence which he ought not to bear; and there seems to be an absurdity in saying that retention cannot be obtained without diligence, when the creditor is already possessed of the subject as completely as diligence could make him.

Our decisions are still more explicite than our authors.

1. The decisions in the case of cautioners, seem decisive of this question. In the case of Strachan †, it was found that re-

† This case is collected by Fountainhall, July 1709, Vol. II. p. 509. and by Forbes, 14th February 1708, page 240. The case was shortly this:

Andrew Skene, in July 1671, granted bond for L. 1000 to his brother James Skene; on the 11th November following, he engaged as cautioner for him for certain rents due to the town of Aberdeen; and, in December, granted a disposition in security to the town over his lands. In these circumstances, had James Skene, the creditor in this bond, demanded payment, the case would have resolved into the simple question of retention. But, on the one hand, the bond was assigned in May 1672, (half a year after the debtor had engaged as cautioner for the creditor), to Alexander King, by him to Janet Lumisdane, who obtained an heritable bond in 1674, and conveyed her right to the town of Aberdeen. On the other hand, Patrick Strachan, a creditor of Andrew (the debtor and cautioner), inhibited him, August 1673, before the bond of corroboration had been granted, and got an heritable security from him over his lands, and made it real by investment. In this situation, Strachan brought a process of mails and duties of the lands; and, in a competition with the magistrates, the question came to be, whether Strachan was not entitled, as a creditor of the debtor in the bond, to oppose any claim of the magistrates founded on that bond by the claim of retention, competent to the debtor himself in relief of the cautionary obligation; so that besides the simple point of retention, it was questioned whether this was a right of such a kind as to be transmissible to a creditor who had not directly and specially af-

retention was competent to a cautioner, even against the onerous assignee to a bond, until the debtor be relieved of his cautionary engagement. The case of *Menzies v. Irving*\*, is precisely in point, and establishes clearly the general doctrine; for, in that case, retention was admitted for a debt, existing independently altogether of the contract of which performance

C A S E  
I.  


affected the claim of relief, and whether, on the other hand, it was so strong a right as to affect an onerous assignee to the bond.

On the general point, the argument does not seem to have been very full; the chief part of it proceeding on the favourable situation of the onerous assignee. In support of the right of retention, it was said, that one reason why our custom allows retention in a man's own hand, to have the same effect with arrestment in the hands of another is, that a person cannot affect directly, by arrestment or otherwise, money, &c. in his own hand; that the claim of retention was in this case enforced by the consideration, that the cautionary engagement had been incurred after the granting of the bond; that though the cautionary obligation had not been liquid, retention would have been competent to the debtor in the bond but it was liquid; that the creditor of the debtor comes exactly into his shoes; and that, as in personal rights, all exceptions competent against the cedent, are good against the assignee, (18th February 1662, Lord Balmain v. the Earl of Bedford), and as inhibition was used against the debtor before granting the bond of corroboration, the claim of retention must be competent to Strachan as a creditor against the assignees. On the other side, it was argued, that though retention was clearly competent, even against singular successors for what had been expended on a subject, it never was allowed to a debtor in a liquid sum against an assignee, for security of a debt due *aliunde*: it was allowed, that, in equity, retention must sometimes be admitted against a liquid debt; to a cautioner, for instance, pursued by the person he is bound for, and who is at the same time his creditor in a bond; there may be no compensation here, since the debt is liquid while the obligation of relief is merely *ad factum præstandum*, but retention will be competent. This retention, however, as it is founded on an *exceptio doli*, merely personal to the creditor, is not good against an onerous assignee. Besides, every right of retention was renounced by the bond of corroboration. The inhibition can have no effect on this; for though it may stop the conveyance of heritage, it cannot hinder the discharge of a mere extrinsic personal exception.

The Lords found, 1. That Andrew Skene being debtor in a bond to James, and having afterwards engaged as cautioner for him before James assigned the bond, Andrew had right of retention of the sum in that bond, till relieved of his cautionary. 2. Found this right transmissible and competent to Andrew's creditors, as well as himself, notwithstanding the argument that it is a mere personal exception; for the law says, "Etiam ob Chirog. pecuniam pignus retineri posse;" and inhibition was used before granting the bond of corroboration. 3. That it was competent against the onerous assignee, as liable to all personal exceptions established by writ against the cedent.

• M E N Z I E S

AGAINST

I R V I N G.

CHARLES MENZIES writer to the signet, being debtor to Mr. Alexander Irving of Saphock in L. 319, by bond, and charged thereon, *suspends*, that he must have compensation for L. 212, contained in a bill due by Irving, to which he has right: *Answered*, Your compensation cannot extinguish my debt; because I recompense you again, in so far as I am cautioner for you in a 3000 merks bond, whereof you are bound to relieve me; and so I must have retention of your L. 212, whereon you ground your compensation, till you relieve me of that debt. *Replied*,

3 L

There

## CASE

I.

ance was demanded. On the one hand, there was a specific liquid obligation for a sum of money. On the other, there was only a claim *ad factum præstandum*, for relief of a cautionary engagement. If retention then be admitted in this case, where can there be two obligations so different from each other as to exclude the idea of retention? It may perhaps be said, that in this case the cautionary obligation may have been subsequent to the debts, and contracted on the faith of them: But it may be observed, that the debt due by the person engaging as cautioner was a bill-debt; and as the bill might have been indorsed, it could not be on the faith of it that the cautionary obligation was entered into: And there is another case where the very same decision was given, though the cautionary obligation had been incurred before the debt was contracted\*.

On

There can neither be retention nor re-compensation, unless you were distressed and had paid the debt. And seeing the concurrence of the two debts does *ipso jure* extinguish one another, no pretence of retention can make a debt extinct to revive; the bond of relief being only an obligation *ad factum præstandum*, and so illiquid. *Duplied*. His claim of retention is founded both in the common law, in reason, and in the analogy of our municipal law: And first, the Roman law is plain in *L. unica C. etiam ob chirograph. pecun pignus retiniri posse*; though you pay me the debt for which I had the pledge, yet I'll retain it if you owe me any sum, till that be likewise paid or secured. Next, this retention is founded in reason; for if I have your effects in my hands, and you owe me money, you cannot draw them out till you pay, it being *tutius rei inherere, quam in personam agere*. 3tio, As to our own law, a creditor in relief cannot by any diligence of arrestment, or otherwise, affect the subjects in his own hands, as if it were in another's; for supplying which difficulty, law has allowed retention; and was so found betwixt Ballenden and Sinclair; and 14th February 1708, Mr. Patrick Strachan and the town of Aberdeen. And although he be not yet distressed, he knows not how soon he may be overtaken, the creditor having *paratam executionem* against him when he pleases; so that it is more than a mere *factum præstandum*. The Lords found, that the retention took place against the liquid compensation; and that he was not bound to let this debt be extinguished by the compensation, till he was relieved of his cautionary; 10th July 1711, Fountainhall, Vol. II. p. 657.

## • CREDITORS OF MURRAY,

AGAINST

CHALMERS.

MR. MURRAY lodged a sum with Chalmers his agent, taking from him a declaration, that the money was put into his hands for the purpose of paying a certain debt, and that he was to pay it, and report a discharge. Murray died before the debt was claimed, and Chalmers, when pursued by Murray's creditors, claimed retention of the money, in relief of debts in which he was cautioner for Murray. The creditors do not seem to have disputed the general right of retention; their argument went chiefly on the express nature of Chalmer's obligation as a mandatory; they said, that by the statute, compensation is confined to actions of debt, and does not take place in an *actio mandati*, where the mandatory is employed merely as a hand, and must act exactly as a hand paying the money as directed, or returning it to the proprietor. Chalmers, on the other hand, admitted, that such was the nature of this obligation that had the mandate been still entire, he could have claimed neither compensation nor retention, he must have paid the money

On the principles of that decision, had Faulds, agreed to deliver the goods to a certain merchant, when bleached, he must have done so without hesitation. But if that bargain had in any way expired, or had this third party lost his right of demanding the goods, Faulds would have been liable in a simple claim of restitution, subject to retention.

The admission of retention in the case of a cautioner, strongly supports the existence of the general right of retention; it shows also that it is a stronger right than compensation, since compensation is pleadable only where the cautioner has paid the debt.

2. Similar decisions have been given in the case of factors claiming retention; they have been found entitled to retain the goods of their constituents, till paid not only their factor-fee and outlay, but every debt due to them by their employers. In the Dictionary, *voce Count* and *Mutual Contract*, several cases of this kind will be found; see also Erskine B III. tit. 4. § 21. Now, were the doctrine on the other side good, a factor could have retention, only for his factor-fee and disbursements as factor; the extent of his retention cannot arise from the presumed will of the parties, nor from the factor's trusting to indemnification for his advances, from goods coming afterwards into his hands as factor, for, 1. His retention extends to debts due to him *ab ante* by his constituent. 2. The factory may be revoked, at any time when the factor is not possessed of a single article belonging to his constituent.

3. A writer's right of retention, is another proof of the existence of the general right of retention. It extends to every

money, or returned it on demand; but the mandate being expired by Murray's death, the money became a proper debt due to his representatives, and subject to compensation and retention. In answer to this, the creditors argued, that the alternative branch of the mandate was to restore the money to Murray, or those having right from him; that this debt remained entire; that had Murray recalled the commission, Chalmers must instantly have restored the money, and could not have claimed retention; yet, by such alteration, the mandate was as much at an end as by Murray's death. But Chalmers replied, that the cases were widely different; during Murray's life, there was no *termini habiles* for compensation and retention, since Chalmers, if he did not restore it to Murray, was bound to pay it to the creditor, whose debt he had been ordered to pay. But by the mandant's death the mandate had expired, the mandatories could not pay it to the creditor, and nothing remained but the simple claim of restitution, which must be subject to retention. The case would, on this principle, have been exactly the same, and the claim of retention good against Murray himself, had the alternative obligation to pay the debt been taken away by that debt being *aliunde* discharged.

The Lords found, that the mandate expired by Murray's death: That by this Chalmers came to be in the common case of one having his debtor's money in his hand, for which he was bound to account: And therefore found him entitled to retention, till relieved of his cautionary engagements.

C A S E

I.

account of business due by the constituent, however unconnected with the papers in the writer's hands.

4. Retention has been acknowledged and supported by decisions still less ambiguous than these. It has prevailed over some of the best founded maxims of law that stood in its way; for possession, though unlawfully acquired, has been found to bestow a right of retention, notwithstanding the maxim, *spoliatus ante omnia restituendus*.

In the case of *Lees v. Dinwiddie* \*, reported by Lord Fountainhall, 10th December, 1707, Vol. II. p. 402, and by Forbes, of the same date, p. 206, the general right of retention was sustained to a poinder though his poinding had been executed after the debtor's death. In the case of the *Creditors of Glendinning v. Montgomery of Magbiehill*, a decision

\* L E E S

AGAINST

D I N W I D D I E.

DINWIDDIE was creditor to Glas by bond; he poinded certain subjects belonging to Glas, who had gone abroad some time before: Lees, another creditor, (who had confirmed himself executor), appeared, and on proving that Glas had died abroad before the execution of the poinding, it was found null. The confirmation of this creditor having been afterwards reduced at the instance of the next of kin, she pursued Dinwiddie for restitution of the goods he had acquired by the null poinding, as being in his hands *sine causa*; Dinwiddie claimed compensation of the debt he had poinded for, and the Commissaries of Glasgow, before whom the cause came, found him entitled to it. Afterwards Lees claimed the goods from Dinwiddie, who defended himself on the decree of absolver, in the question with the nearest of kin. Lees, in answer to this defence, argued, that he being creditor as well as executor, and having cited both the nearest of kin, and Dinwiddie, for the goods confirmed, had acquired a preference on these goods; since the using of habile diligence against executors, is the legal way for a creditor to secure to himself a preference on the funds of his deceased debtor: That there could be no concurrence of debt and credit in the person of the executor, since she was debtor only for the free funds unaffected by the diligence of other creditors: That the preference bestowed by this act and diligence against the executrix, could not be excluded by Dinwiddie's claim of compensation, otherways creditors could easily acquire secret preferences to the disappointment of legal diligence: That as the creditor of a defunct cannot, by taking assignments to debts due by the defunct, raise up a claim of compensation effectual against the executor, (as was found 8th February 1662, Crawford v. Earl of Murray; and 14th February 1662, Children of Maxwell v. Laurie), far less can such unwarrantable intrusions as Dinwiddie's, entitle him to a preference by compensation over other creditors using habile diligence. Dinwiddie replied, 1. That there was a clear *concurfus*, since the executrix was debtor to all the defunct's creditors *quoad vires inventarii*; and Dinwiddie was a creditor by bond, and a debtor as intruder. 2. That the decisions refusing compensation to assignees are not applicable, since Dinwiddie was not an assignee after the death of the debtor, but creditor to him *proprio nomine*. 3. That Lee's citation being given as executor, and his confirmation being afterwards found null, the citation was void to all intents and purposes. Some other arguments were used concerning the formalities of Lees' confirmation, &c. and Lees offered an imprecation of the execution of the executrix's edict, with a view to reduce the confirmation, and perhaps in consequence Dinwiddie's absolver. But the Lords sustained Dinwiddie's compensation.

cision somewhat similar was given †. In reporting the case, Lord Kaimes, who was a lawyer in the cause, and must have been well acquainted with the whole reasoning of the Judges, makes the following remarks: "This judgement is solidly founded on the nature of an arrestment, which can serve no other effect, than to oblige the arrester to pay or deliver to the arrester what he was bound to pay or deliver to the common debtor. Now Magbiehill having got into his possession, the goods of the common debtor, though by an informal execution, even Elchies yielded that in equity he was not bound to re-

† CREDITORS OF GLENDINNING.

AGAINST

MONTGOMERY of MAGBIEHILL.

Montgomery of Magbiehill took a bill from Glendinning; he sent it to a notary to be protested, and a regular protest was returned, on which Glendinning's sheep were poinded. Glendinning became insolvent, his creditors arrested in Magbiehill's hand, pursued a forthcoming, and repeated in it a reduction of the poinding, on the ground of the protest's being false. It was proved, that the notary had made out the instrument at home, without having ever protested the bill, and the protest was found null.

The creditors insisted, that the nullity of the poinding left the goods, which were in Magbiehill's hands, still the property of the debtor, and insisted that they should be immediately restored. Magbiehill contended, that the *bona fides*, with which his possession began, entitled him to retain the subjects till the debt was paid; and, in support of his plea, quoted the above case of Lees and Dinwiddie. He argued, that in a question with the debtor himself, there could be no doubt of the right of retention, as little therefore could there be in this case, since the arrestment does not transfer the property. The creditors argued, in reply, that *bona fides* is of no effect in a competition between creditors; that as there was no protest, the poinding was unwarrantable, and since *spoliatus ante omnia restituendus*, there could have been no retention, even in a question with the debtor himself; but although it had been good against him, it would not follow that it would have affected his creditor: Apprisings and adjudications are often wholly reduced in competitions, which subsist as very good securities against the debtor; besides, there are objections not only to the protest on which the poinding proceeded, but to the execution of the poinding itself.

According to Kaimes's report, *Elchies* thought that the informality prevented the poinding from transferring the property; that therefore the sheep, as Glendinning's property, regularly attached by the arrestment, must, by the decree of forthcoming, be transferred from the common debtor to the arresters; so that there was no room for pleading compensation or retention. *Arniston* was of opinion, that arrestment making no *nexus realis*, Magbiehill was intitled to retain subjects coming innocently into his hands until he got payment; and that this equitable rule is good against the arresting creditors, as well as against the common debtor. He thought the difficulty would have been greater had the creditors attempted to poind. *Drummore* said, that retention was frequently allowed, even where the intromission proceeds on the authority of an informal execution; as in an adjudication, which though annulled in a competition, has always been sustained, to save from repetition of the intromissions under it, so much weight is laid upon the *bona fides* of the intromitter.

The Lords sustained the defence, that Magbiehill, as a creditor to Glendinning, having *bona fide* poinded his debtor's sheep, is not bound to restore the sheep, or to hold count for the price or value of them, till payment be made of the debts on which the execution proceeded, 8th June 1745.

“ store

## C A S E

I.

“ store the same to the common debtor, without getting pay-  
 “ ment of his debt. If so, the arrestment could not bind him  
 “ to restore these goods to the creditor, but on the same terms;  
 “ as an arrestment can have no farther effect, than to transfer  
 “ the obligation from the common debtor to the creditor, and  
 “ by no means to afford a stronger claim to the arrester than to  
 “ the common debtor; and as compensation is good against an  
 “ arrester, retention ought equally to be sustained, where the  
 “ common debtor is bankrupt, it being an established point  
 “ in equity, that tho’ compensation cannot be proposed after  
 “ decree, it may be proposed by way of retention, where the  
 “ party has no other chance of obtaining payment.

Even were these two decisions to be held as bad, it could be on this ground only, that an unwarranted poinding is no better than a spuilzie, and therefore can found no retention. But these cases evince a clear and settled opinion in the Court, (and they were both decided on full deliberation) that possession, legally and properly acquired, gives a right of retention, till the debts due by the owner to the possessor, are paid.

The case of *Stephenson’s Trustees v. Hewit and Brockhurst*, in 1775, strongly confirms the doctrine of retention; for there bills having been put into the hands of Hewit and Brockhurst, for the mere purpose of negotiating, and without the consent of the proprietor; this Court, by a very narrow majority, found them not entitled to retention; but the House of Lords reversed the judgement, and sustained the claim of retention. This case is much stronger, since there is no dispute here that the goods came into Faulds’s possession with the proprietor’s full knowledge and consent.

One other case there is, and it comes nearer to the present, as it was a claim of retention by a bleacher of cloth given him to be bleached. From that case, it appears, that had the circumstances been similar to those which have here occurred, the plea of retention would have been sustained; but there the cloth, though lodged by a weaver, was not his property; and as the retention was claimed against the weaver’s creditors, for the expence of bleaching a parcel formerly sent by him, it was thought sufficient to elide the claim, that the cloth belonged not to the weaver, 30th July, *Lifty v. Hunter*.

There seems then to be no doubt, that, by the law of Scotland, as appearing from our writers, and still more explicitly from our decisions, the right of retention contended for, is clear and well founded.

On the other side, it has been argued, that no security can be constituted by our law, but by diligence or consent of the owner; that this consent must either be express or clearly inherent and implied in the nature of the transaction, as in mutual contracts where the obligations of the parties are con-  
 conditional

ditional of each other, and that no security can be created by mere accident. But the nature of retention will be attended to. It is not a hypothec; it is not a pledge: these are real rights, bestowing a *jus in re*, indefeasible by the onerous assignation or conveyance of the proprietor; retention, on the other hand, is a mere personal exception founded on equity, which forbids a man to demand payment of what is due to him, while he himself refuses to pay. Suppose, in illustration of the distinction, that a shipmaster has goods on board his ship belonging to his debtor, he has an hypothec for the freight and retention for his own debt; the former is effectual against the most onerous assignee to the bill of lading (see *Bogle v. Dunmore and Company*, 2d February, 1789) but the right of retention is not good against an onerous indorsee; the right of retention claims not the privileges of a pledge or hypothec, it is a defence in equity against performance, till obligations, equally strong, be performed in the other part. This is the great distinction, between pledge, hypothec, &c. and retention, and it takes all difficulty from the question; for however necessary consent or diligence may be to constitute a real lien, it is not so with retention.

An attempt has also been made, to shake the doctrine of retention, by applying it to the case of real rights. Thus it was asked, whether, after the expiry of a lease, a tenant could retain, till paid a debt due by his landlord? Surely he cannot: Because the rules of compensation and retention affect moveables only; real property is no proper subject for retention, it is the rent only which can be affected by this claim, and it cannot be doubted, that over that, the right of retention would fully extend. In the eye of law, the tenant is not even in possession of the lands, he has merely a right of cultivating them, and reaping the crops on payment of the rents; and lately a very important question was decided on this ground, that even the crop is not the tenant's till he has made it his own by payment of the rent. So different indeed is the law of retention of rents, from that of the retention of other goods, that, by no stipulation with his landlord, could a tenant acquire a right of retaining the rents which would be effectual against singular successors, though this would be perfectly practicable as to other goods.

The law of England can, in a question like this, have weight only so far as it is founded on general principles. The local consuetude, or particular statutes of England, can be of no force. It is to their courts of equity that we are in this view to look, and in them the general principle is clearly recognised. "The expedience of retention, in this respect, (says Lord Kaimes's Principles of Equity, B. XI. c. 3.) has gained it admittance into all civilised nations. In the English Court  
" of

CASE

I.

“ of Chancery, particularly, it is a well known exception; of  
 “ which I gave the following instance: If the plaintiff mortgage  
 “ his estate to the defendant, upon bond, the redemption ought  
 “ not to take place, unless the bonded debt be paid as well as  
 “ the mortgaged money.” See also the case which Kaimes refers  
 to, I. Vernon, p. 244. case 234. Even in the courts of law in  
 England, the Judges, though tied up by strict rules, and a va-  
 riety of statutory regulations, admit the general principle.  
 See the case of Green v. Farmer, Kings Bench, 1778; Case  
 of Dieze, Aitken’s Reports, Vol. I. p. 299. In these cases,  
 the opinion of Lord Hardwick, and Lord Mansfield, concurred  
 in this, that retention, was strongly founded on equity, and  
 favourable to commerce. Both too seem to regret, that they  
 were limited by the statutes of set-offs in England, from extending  
 them as far as natural justice, and the convenience of commerce  
 required. In the case of Ockenden, mentioned in Lord  
 Mansfield’s opinion in Green’s case, Lord Hardwick thought  
 it a very doubtful question on the clause of the statute. On  
 the other hand, in several cases mentioned by Sir James Bur-  
 row (Krutzer v. Willox, p. 973, and Foxcroft v. Devon-  
 shire, &c. p. 943). the courts of law in England sustained reten-  
 tion to factors for their whole debts however incurred; and  
 in the late case of Anderson and others assignees of Maltby v.  
 Newton and others, at Sittings after Trinity Term 1789:  
 “ The question was tried before Lord Kenyon and a special  
 “ jury, when it was fully determined, that a callico printer  
 “ had a lien upon goods in his hands, for the price of print-  
 “ ing such goods, as also for those which he had formerly de-  
 “ livered, upon full evidence being given of the trade and uni-  
 “ versal custom, whereupon the callico printer had a verdict †.

From these English cases (not quite intelligible perhaps to a  
 person not intimately versed in that law) this, at least appears,  
 that so strongly founded on natural justice, and commercial  
 conveniency, is this plea of retention, that the English Judges  
 have gone as near to establish the general exception as the sta-  
 tutes would admit of.

II. What is the effect of the proprietor of the goods being  
*vergens ad inopiam*, or insolvent? Though the right of reten-  
 tion be well founded, it might very well be argued, that some  
 limitation were proper, while the parties were going on in  
 business, since it must be inconvenient for a merchant to have  
 his goods locked up, and his transactions stopped by a claim

† This case is given in these words in the papers, on a certificate of the truth of  
 the statement, by the assignees of Maltby, who add, that they brought the ques-  
 tion, as it had never been determined before.

of this kind. But it is only while a merchant continues solvent, that any such inconvenience can arise; it may perhaps, from these considerations, be presumed, that no merchant would put his goods into the hands of a manufacturer, without an understanding that his transaction should not be interrupted by a claim of retention; but what foundation can there be for such a presumed understanding continuing after insolvency. On the other hand, it may naturally be supposed that tho' the manufacturer might be willing to renounce his claim of retention, while the employer continued solvent, he would not be inclined to renounce it on his insolvency. Any such limitation, then, of this right of retention, from the presumed intention of the parties, must be confined to the case of solvency; to extend it further would be to presume a condition which one of the partners has the clearest interest to resist, and the other has none to demand. In proportion, therefore, to the failure of the proprietor's credit, should the right of retention be strengthened. There are many cases illustrative of this: Thus, when a father binds himself to secure his wife and children in a certain sum of provision, it has been thought to be implied in the nature of the contract, that while the father's personal security continues good, his effects are not to be wrested from him, and put *extra commercium*; yet when he is insolvent, or *vergens ad inopiam*, performance may be enforced: for it is not to be presumed that the wife and children mean to wave their right to their own prejudice. See *Oliphant v. Robertson*, 10th February, 1704, Fount. Vol. II. p. 222. Neither the presumed intention of the parties, therefore, nor considerations of expediency, can apply to the case of the employer's becoming insolvent, and the right of retention, must therefore take place, in its full extent.

III. Considering this claim, as a question occurring with the creditors of a bankrupt, it must be equally effectual. None of the bankrupt statutes, strike against such a claim. The right of retention competent to the *bona fide* possessor of his debtors effects, is a right flowing from circumstances and situation, which it was the object neither of the act 1621, nor of the act 1696 to take away. As to the late bankrupt statutes, the only object and effect of them is, in the event of a bankruptcy, to divest the bankrupt, as speedily as possible; and as former statutes had reduced preferences created by the bankrupt's voluntary deed, within a certain time of the bankruptcy, the latter was intended to cut down all preference, even by diligence, within a fixed period. The creditors and their trustee come just into the bankrupt's place; his right passes to them *tantum et tale*, as it stood in him, and consequently must be liable to the exceptions to which he was subject: were it otherwise,

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ways, this case would be still harder, than the case of the proprietor *vergens ad inopiam*. Lord Mansfield, in delivering the opinion of the Court, in Green's case, says, when speaking of the law refusing to allow a set-off between unconnected debts, "The natural reason of mankind was first shocked with this in the case of bankrupts. They thought it hard that a person should be bound to pay the whole that he owed to the bankrupt, and receive only a dividend of what the bankrupt owed him." The questions in Hewit and Brockhurst's, in Menzies', and in Murray and Chalmer's case, were all with creditors; yet in them retention was allowed.

It may also be remarked, that to deny the right of retention, in the case of bankruptcy, would place the possessor of the bankrupt's effects in a worse situation than any other creditor, since he neither can arrest nor point in his own hands; and this indeed seems to have been admitted, in the case of Strahan, &c. formerly quoted.

It has been argued that retention ought not to be admitted since it may be a cover for frauds, and must be attended with many inconveniencies. With respect to the inconvenience, it is sufficient, in addition to what has been already said, to observe, that if this argument be good, it goes farther than the trustees plea; for retention is admitted for the price of the work, although a dispute may arise about the price, which shall lock up the goods for an indefinite time: and this is a greater inconvenience by much, than any that could flow from retention for a liquid debt. As to the fear of fraud, it is inseparable from mercantile transactions. Where it occurs it will be checked; but it has not been thought necessary hitherto, to take away such a right with a view to prevent fraud. There are several constructive frauds, but this is none of them.

Argument for  
the trustee  
against the  
claim of reten-  
tion.

The right of retention to the extent claimed by Faulds, would be a right dangerous to the manufacturer, and no less so to his employer. The employer must often enter into contracts, while the goods are still in the hands of the manufacturer, by which he becomes bound to deliver them on a certain day; he is liable for the damage which may be the consequence of a failure in the delivery, and the delay of a day may be attended with his ruin. It will not be on slight grounds then, that an artist will be allowed to retain goods put into his hands to be manufactured; nor will the circumstances of his being creditor to the employer be sufficient. If, in such a situation, he receive the price of his labour, when the goods are demanded, he receives all to which in justice he is entitled. If he has reason to suspect the situation of his debtor, the manufacturer has only to convey his claim to a trustee, who will be in a

capacity to attach the goods in the same way, with any other creditor.

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Considering this claim as it affects the creditors of the employer, it is equally inexpedient and unjust; a security of this kind, is a latent one: There is no appearance from which other creditors can be put upon their guard; on the contrary it is a security which can be given with the greatest facility, when there is an appearance of the most flourishing trade, and withdraws from the operation of the bankrupt law, one third of the manufactures of the country, which is that proportion of the materials that is constantly in the hands of the manufacturer.

Our law has always been much averse to latent securities; that (as Stair says) "commerce may be more secure, and every one more easily know the condition of him with whom he contracts." And it is on this ground, that we have rejected several of the hypothecs, and that the Court, in the case of *Wood v. Hamilton*, refused an hypothec for the repairs of a ship in a home port. Our law has also been peculiarly anxious to prevent undue preferences. It is to this that the maxim, *vigilantibus non dormientibus jura subveniunt* has yielded; and it is to avoid these preferences that a time has been fixed within which no preference can be obtained, either by voluntary deed or legal diligence; yet all these wise regulations would at once be rendered useless by the introduction of the right of retention.

On examining our law, no doctrine of such evil tendency is to be found. Fauld pretends to resort to the first principles of our law; but disquisitions on the state of law, in rude and barbarous times, must depend greatly on fancy and conjecture: Beginning therefore where facts direct our research, we find, that compensation and retention were not originally branches of our common law: That in every country they have been introduced from considerations of equity; and have been admitted in no law without many limitations.

In Rome, so far was compensation from being a part of the common law, that it was first admitted *ex equitate* by the Prætor, in *judiciis bonæ fidei*, and was not extended so as to be admissible in *judiciis stricti juris*, till the time of the Emperor Marcus. Vien. and institut. p. 811. In England, compensation was first introduced in Chancery; and even there, only in special cases, where the nature of the transaction consisted in a variety of receipts and payments, on which the balance was to be struck, the settling of mutual debts was introduced only by very late statutes; not till the 4th Ann, and 2d, 5th, and 8th George II. In our law it was not till 1592, that compensation was recognised; so strongly was the opposite principle established

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in common law, that a special statute was necessary for correcting it. This has been contraverted, but it is proved from Sir James Balfour's *Præctics*, p. 249, where it is said, "compensation beand objectit be the defender, by way of exception in any action or cause, should not be admittit, albeit, it be *de liquido in liquidum*; because be the law of this realm na exception of compensation sould be admittit, bot action sould be resarvet to the proponer thereof to pursue for the debt, auchtand to him as accordis of the law, 5th May, 1543; the Queen against the Bishop of Aberdeen." Stair also says, "That compensation seems not to have been competent by the law of Scotland, before the act of parliament 1592." Now the statute admits compensation only, 1. When the debts are liquid; and, 2. When pleaded before decree, (and these, though somewhat relaxed, are the principles upon which this plea is received). The act says nothing of retention, nor of any obligation, but that for the payment of money; so that retention was an exception afterwards admitted by the Court of Session, without the authority of any statute, and merely as an equitable extension of the right of compensation; yet retention is now claimed, whatever be the nature of the opposite claims, whether liquid or illiquid, pure or conditional, &c. which is much further than compensation could have reached; and had this been the law, the enactment allowing one illiquid debt to be set off against another, was very idle.

By the law of Scotland, security can be constituted over a subject by *consent* of the owner only, or by *legal diligence*; *consent* is either express as in a pledge, or implied, which arises,

1. From circumstances clearly inferring such consent: As where a debtor becomes cautioner for a creditor, he will be entitled to plead retention, till relieved of his cautionry engagements; Strachan v. the Magistrates of Aberdeen, 1st July, 1696 †, on this ground, according to Fountainhall, that it was on the faith of the debt that the debtor engaged as cautioner. So, in the same manner, is a factor entitled to retention, when he has engaged for his constituent; (and this whether he be factor for a merchant, or merely a gentleman's steward,) the principle is obvious, the factor engages on the faith, that the goods in his hands or the balance that will be in his hands at settling accounts, will, from the nature of the connection, be a security for any balance due to him.

2. Retention by implied consent, arises also from something inherent in the nature of the transaction, as in mutual contracts, where the obligations of the parties must be held to

† See the case below.

be conditional of each other, and where consequently neither can demand performance, while he refuses on his part to perform. In the Dictionary, and in many of our books of decisions, innumerable instances of this will be found under the title Mutual Contract, as well as under the head of each particular contract. Suppose, in illustration, that, in a marriage-contract, the bridegroom becomes bound for certain provisions to the wife and children, while the bride and her friends, in consideration of these provisions, become bound to pay certain sums to the bridegroom; these are obligations conditional of each other. Thus also, where missives of sale have been exchanged, the seller cannot be compelled to deliver the disposition till he receive the price, or security for it; because the obligations are reciprocal. On the same principle it is, that a manufacturer is entitled to retain goods put into his hands to be manufactured, till the price of the labour is paid. These are the counter-parts of a mutual contract, conditional of each other, entitling either party to refuse performance, till the other be ready to perform.

These then, are the only ways in which securities can (independently of diligence) be constituted by our law; and this is the only true and solid foundation of the right of retention, which a manufacturer is, without an express stipulation, entitled to claim. It is anomalous and inconsistent with every principle, that a security should be created, or a preference given, by mere accident, independently either of the will of the owner, or of the creditor: And merely by the creditors chancing to become possessed of the goods of his debtor, or by the possessor of goods, becoming afterwards creditor to the owner of the goods. Were an artist entitled to retention, not only for his hire, but likewise for other debts, this were not only to create a security independently of the will of the owner, and without diligence, but contrary to the understanding and agreement of both parties; for, when an artist receives goods to be manufactured, the parties are understood to agree, that the goods are on payment of the price, to be returned when the operation is performed. Were it otherways, the worst effects might follow, since it is of importance that the manufacturers have their goods early at market, both for a better sale, and a quicker return of the money; and since there are besides particular seasons, in which dealers lay in their stocks, the loss of which opportunity might be ruinous.

An agreement of this kind, is in fact a *locatio conductio operarum*, where there is not the slightest intention of transferring the property, of constituting a security, or even of transferring the possession; legally speaking, the possession is still with the owner, the artist is merely the custodier. It is this kind of custody,

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custody, which Voet describes, when he says, "*Quod illi qui habent animum rem alieno nomine tenendi, non tam possessiores, quam potius nudi detentiores sunt, alienæ possessioni ministerium præbentes,*" Lib. IV. tit. 2. § 1. And accordingly Celsus says, "*Possidet, cujus nomine possidetur,*" L. 18. ff. "*De acquir. vel amit. possess.*" In the law of England, this kind of custody has obtained the name of *baillement*; and Blackstone says, "*Baillement* (from the French *bailler*, 'to deliver.') is a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed upon the part of the baillie; as if cloath be delivered, or (in our legal dialect) baillied to a tailor to make a suit of clothes, he has it upon an implied contract, to render it again when made, and that in a workman-like manner," Comment. Vol. II. p. 452. In short, the artist is employed as a hand to perform a certain operation upon the goods. The case is not materially different from what it would have been, had the goods remained upon the owner's field, and the artist been brought to that field as a workman to perform the labour upon them. In either of these cases, the artist has such a hold of the goods, as to entitle him to refuse delivery of them, till the counter-obligation be performed to him; or, in other words, he has a lien upon the subject improved and meliorated by his own industry, for the expence of the improvement. To this extent, in every case, retention is acknowledged. But surely it can never be sustained to such a mere custodier of goods, to the effect of operating as a security for all debts that may happen to be due to him.

To consider this question more particularly; and first as in a simple question between debtor and creditor. If there be a right of retention so broad and general as this, it must operate in every case, where, without fraud or violence, a creditor shall happen to have in his custody the goods of his debtor; there seems to be no reason, why it should not hold equally in immoveable, as well as in moveable subjects; neither does it well appear, why there should be any distinction betwixt the case of possession under a gratuitous, and possession under an onerous contract, if the clear principle of justice be, that an owner of goods is not to demand restitution of his goods, without performing all his obligations. It is admitted by Faulds, that a person borrowing, for example, his friend's coach and horses, would not be entitled to retain them for debt, because says he the loan is gratuitous, and has nothing to do with commercial dealings. But suppose the loan for hire (a proper *locatio conductio*) can the borrower detain the subject as a pledge? No; and the principle is, that one cannot invert the nature of the contract, and of the possession: so, in an action of removing,

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moving, the tenant will not be entitled to defend himself by the plea of retention. Voët, after saying, that the "*actio locati tendit ad id, ut finita conductione, res in eodem statu quo data, restitatur,*" that restitution cannot be opposed even on the *exceptio dominii* lays it down, that even "*pro impensis et meliorationibus, in rem conductam factis,*" the subject cannot be retained if caution be offered, Lib. XIX. tit. 2. § 32. far less could he pretend to retain, or even to ask caution for a separate debt.

The same principles are received in our law; see Colvil, November 1583, Cunningham v. Cuck. Haddington, ult. November 1592, Lesly v. Tenants of New Abbey. Stair, 22d November 1677, Stewart v. Duke of Hamilton. Spottiswood (*voce Possession*), 1591, Harris v. Anderson. Dictionary (*voce Mutual Contract*), Vol. I. p. 559. The principle of this is, that a person cannot convert one contract into another. Or, in other words, "*Nemo potest mutare causam suæ possessionis,*" having received a subject on certain conditions, he cannot invert his possession under that contract, nor oppose restitution of the subject upon any ground, but that of insisting for performance of the counter obligations in the contract itself. Vinnius, in his *Select Questions*, Lib. I. c. 41. explains very well these principles: He states it as the general rule; "*Non posse creditorem, cui sine pignore pecunia debetur, rem debitoris pro eo quod sibi debetur retinere.*" And the only exception he makes is, that he may retain for that "*quod contrario judicio consignari potest;*" or in other words, "*quod occasione quodam contractus, eis abest et vel maxime impensas necessarias.*"

If this be the law in mutual contracts as *locatio conductio*, &c. still more strongly must it hold in cases like this, where no use is meant to be given, where the goods are not even in the artist's possession. It is indeed admitted, that retention is excluded by an express covenant to restore; but the obligation to restore is as strong by implication, as if expressed in the plainest words.

If there be so general a right, it should be explicitly and clearly laid down by our authors, and recognised in the decisions; but that is far from being the case.

STAIR treats of retention very shortly, See B. I. tit. 17. § 15. Had he conceived any such broad and general right of retention, as Faulds contends for, to exist, he would not have spoken of it as so limited and circumscribed.

BANKTON, B. I. tit. 16. § 15. Had he thought retention competent for more than the expence bestowed, he would have laid it down in precise terms, and not have spoken in this way. See also B. I. tit. 24. § 13.

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ERSKINE, B. III. tit. 4 § 21.

Nothing then, in these authors, countenances the general right contended for. It has been said that they admit the general right, and that the cases they put are merely illustrative, and not restrictive; but had they entertained any idea of the general right, there could have been no room for the limitations they speak of. Stair would have had no occasion to say that retention is competent for the expences wared out on the subject. Nor Erskine to mention the tradesman's right, as extending to expences disbursed on the subject, or to "the price of the workmanship." For it would not have signified from what the debt arose; neither could they have said that retention was of late extended to the case of factors. To a certain extent, it may no doubt be said, that the instances given by these authors are not to be held restrictive, since these were not the only cases in which retention took place. But, on the other hand, they must be held so far restrictive as to limit the right of retention (according to the opinion of these authors) to cases agreeing in principle with those they have given. And no doubt if this case accord in principle with them, the authority of these authors, will support the claim that is here made; if not, then this must be held as a case unknown in the law at the time that these authors wrote, since one so remarkable must have called their attention.

If there be nothing in our authors to support the right claimed, neither is there any thing in the decisions.

1. In the Dictionary, Vol. I. p. 594, many decisions are given where retention was found competent to one party in mutual contracts, till the other party performed. And pointing out, by various distinctions, where retention does, and where it does not operate. Why all this if retention be so general and broad a right?

2. The case of factors has been mentioned in proof of the general right of retention; but the retention given to a factor is clearly founded on implied consent arising from the very nature of the transaction: 1. When he claims retention for his expences, he is in the same situation with an artist claiming the price of manufacturing the goods: It is the *actio contraria* of the contract, Dictionary, Vol. I. p. 594, 14th February 1735, Captain Stephens. 2. When he claims retention for advances, the presumption must clearly be, that he made these advances on the faith of the funds in his hands, or of the money being replaced by consignments in the course of the factory. A factory is constituted not for a single act, but for a series of acts; the factor is to go on acting for his constituent, recovering and paying, till the factory be recalled, and accounts settled; and it must be implied that he shall have retention of what may be in his hands for any balance due to him.

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3. The right of a writer to retain his client's papers has also been asserted in point of the general principle. It is shown the reverse; but at the decisive point, that it is a right competent only for the writer's own use, and not for the benefit of the party in that character. Thus, in the case of the *Creditors of Liddell & Co. v. Liddell & Co.* 1808, 10 T. R. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

4. Much has been said on the case of cautioners, and their right to retain in reple, and the case of *Menzies and Irving* has been mentioned. The retention of a cautioner is to be referred to implied consent, arising from the nature of the transaction; for either the cautioner must have been presumed to have engaged on the faith of a prior debt due by him to the principal, or, if the cautionary engagement be prior, the debt must be held to be contracted for the purpose of securing the cautioner. Accordingly, in *Strachan's case v. the Town of Aberdeen*, *Fountainhall* remarks it as the ground of the decision, that it was on the faith of the debt that the debtor had engaged as cautioner. It is very likely that the case of *Menzies and Irving* was in similar circumstances; for there had been many mutual transactions betwixt the parties, and besides, the creditor in the cautionary debt had *paratam executionem*, so that it was the next thing to a liquid ground of compensation. *Faulds* has also, in support of the general right, referred to the case of the *Creditors of Murray v. Chalmers*: but this was in fact a case of compensation; for the mandate had by *Murray's* death expired, so that *Chalmers* became debtor in a simple debt to *Murray's* representatives, and being also creditor to them, he was entitled to plead compensation. That decision hurts *Faulds's* plea rather than supports it, for had his doctrine been good, retention should have been found effectual, even in a question with *Murray* himself; whereas it was on all hands admitted, that the only circumstance, which left room for *Chalmers's* plea, was the death of *Murray*, and the dissolution of the mandate.

5. *Faulds* has, besides the case of factors and cautioners, referred to cases of a more general description. As to the case of *Lees v. Dinwiddie*, 10th December 1707, to which he refers, it seems to have been attended with particular circumstances. There appears evidently to have been some collusion between the parties, so as to allow the poinder's plea of re-

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tention to be sustained. As to Magbiehill's case, it has always been considered as an erroneous decision; it is very singular, that though the pointing was confessedly null; the pointer got exactly that preference, which an unexceptionable pointing would have given him: the Court was divided—the decision has since been much disapproved of, and it was altered in the subsequent case of Elliot v. Armstrong. As to Hewit and Brockhurst's case †, Faulds quite misapprehends it; the only question

† HEWIT and BROCKHURST Merchants in London;

## AGAINST

DAVID ELLIOT, and Others, Trustees for the Creditors of Andrew Stephenson late Merchant in Glasgow.

17th Feb. 1775.

Stephenson was a silk mercer in Glasgow, and in that character had connections with Hewit and Brockhurst. He also carried on a considerable banking business, which he supported by drawing and re-drawing on the houses of Dove and Reynold's, &c. merchants in London. In June 1772, when a general alarm about the credit of the Scotch merchants took place, Stephenson became anxious lest some of his bills in the circle should be returned. To prevent mischief, he sent Jamieson to London, with draughts to the value of L. 1119, to be delivered to Dove and Reynolds, on whom he had drawn, should it appear that they were in a situation, with the help of these remittances, to honour the draughts. These remitted bills were blank indorsed by Stephenson; and Jamieson received these written instructions: "Glasgow, 22d June 1772, Memorandum for Mr. Jamieson: Inclosed is M'Lure and M'Cree, on Johnston and Rae, (L. 550), which give to Mr John Reynolds on my account; with this provision only, that he accept my draughts to Mr M'Lure and M'Cree, No. 996. to M'Lure and M'Cree at 30 days, L. 170; No. 997. ditto at 40 days L. 250; No. 998. ditto at 45 days, L. 250. If Messrs. Johnston and Company say that their's is not accepted, do not give Mr. Jo. Reynolds the L. 550 draught, but retain it for my use, or Mr. Dove, as occasion requires. Mr. Edward Hewit will direct you in this. Inclosed you have seven bills, L. 569, which give to Mr. Dove, and cause him show how affairs stand with him. The bills due in June on Mr. Dove, L. 9453, he has been remitted L. 10,570 : 17 : 8, besides a bill to Mr. Rossitor, L. 270, returned, and two or four more advised to be returned of L. 100 each. Attend carefully to this, and write me, &c."

24th June.

26th June.

27th June.

On the 24th June, Stephenson became bankrupt. When Jamieson reached London, Reynolds and Dove were bankrupt: He consulted with Hewit as desired; and the bills which he brought up with him were put into Hewit's hands as a fund of credit, according to Hewit's story: But, as Jamieson swears on examination, merely for the purpose of getting them accepted, as Jamieson was unacquainted with the streets. It is certain, that no receipt was granted by Hewit for these bills till the 2d July, after the report of Stephenson's bankruptcy had reached London, when he refused to deliver them up to Jamieson: And it is also certain, that at the time that Hewit got these bills into his hands he did not tell Jamieson that he was a creditor of Stephenson; and Jamieson swears he did not know him to be a creditor. The receipt which Hewit at last granted was in these terms: "Received, June 27. 1772, of Mr. Andrew Stephenson L. 806, (this was the balance after retiring a bill of Stephenson's, and giving L. 200 to Jamieson), by the hands of Mr. Jamieson in the above bills, which promise to account for to Mr. Stephenson."

The trustee on Stephenson's bankrupt estate, having demanded up these bills, Hewit claimed retention.

question was, whether Jamieson had power to lodge the bill as a fund of credit. The point of retention was argued in this Court, but unsuccessfully. As to the powers, this Court thought that Jamieson had no powers to dispose of the bills, and judgement went accordingly against Hewit and Brockhurst:

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In support of the claim of retention, it was argued, that the bills cannot be returned into Hewit and Brockhurst's hands. Jamieson had discretionary powers, as was clear from the nature of the business he was sent on. In the execution of these powers, when he found Dove and Reynolds bankrupts, he acted prudently in placing the bills as a fund of credit with Hewit and Brockhurst, old correspondents of Stephenson's, and in good credit; the bills were accordingly placed in the books to Stephenson's credit: Hewit intended to supply Stephenson from that fund; and he accordingly did so by answering Jamieson's call for L. 200, and retiring a bill of L. 113 of Stephenson's; and it was only on Stephenson's bankruptcy that he claimed retention of what he had thus before become possessed of. When it is considered that the bills in Jamieson's hands were blank indorsed, and so delivered to Hewit, it is not enough to say that Jamieson had no power to transfer them; for the transfer of bills cannot be affected by any thing not appearing from them, and the private instructions which Jamieson received, he never communicated to Hewit.

II. Hewit and Brockhurst being thus *bona fide* possessed of these bills, without any third party having a *jus quaesitum* in them, they were entitled, on the bankruptcy, to apply the balance in extinction *pro tanto* of the debt due by Stephenson. Stephenson's debt amounted, after giving credit for these bills, to L. 147. In support of this proposition, these authorities were referred to:

1. Beawe's *Lex Mercatoria*, "If (says that author, *ex* Bankruptcy,) there are accounts between two merchants, and one of them becomes bankrupt, the course is not to make the other, who perhaps, on stating the accounts, is found debtor to the bankrupt, to pay the whole that was originally entrusted to him, and to put him, for the recovery of what the bankrupt owes him, into the same condition with the rest of the creditors, but to make him pay that only which appears due to the bankrupt on the foot of the account."

2. It is a maxim of the civil law, "*Frustra petis quod mox es restitutus*," and this rule of retention has been admitted in all trading nations. It is material justice, that one of two mutual debtors shall not be allowed to withdraw his funds out of the other's hands, without satisfying him for his debt.

3. This principle has been adopted by the Court of Session; see *Barclay v. Clerk*, January 1683, Dict. *voce Compensation, Retention*, "where the creditor being *vergens ad inopiam*, a defender who was barred from pleading compensation in the second instance by way of suspension, turned his defence into the shape of retention; alleging, that the charger was bankrupt; and therefore, upon the suspender's making payment, the charger should be bound to find caution to be law-biding for the counter-claim, which the Lords found relevant." *Erskine*, B. III. tit. 4. § 20. *Irvine v. Menzies*. *Creditors of Glendinning v. Magbiehill*.

III. It was pleaded, that even had these bills been put into Hewit's hands, to be applied for a particular purpose, the bankruptcy supervening before their application, would have given him a title to retain. In support of this, the case of *Murray v. Chalmers* was referred to.

IV. It was maintained, that merchants consider it as an established rule, that, in the event of a bankruptcy, they may retain every fund of their debtor's coming into their hands before the bankruptcy, till their debts be paid, unless a third party has a particular right over them. And it is of no consequence whether the term of payment of the retained bills was come or not, as was decided in the case of *Sir James Norris v. the York-buildings Company*, where a creditor was found entitled to attach or retain, though before the term of payment. In proof of the

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hurst : The House of Peers again thought that he had such powers, and altered the decree of the Court of Session. Their judgement did not go on the point of retention ; and so it was declared by very high authority, in the case of *Walter Scot v. the Creditors of Seton*.

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understanding of merchants, the opinion of eighteen respectable London merchants was produced †.

Argument for  
the trustees.

On the other hand, it was argued for the trustees,

I. That, as to the fact, 1. Hewit had got these bills from one having no authority to dispose of them : Jamieson's letter of instructions empowered him to dispose of them in one way only. In preventing the return of Stephenson's circulating bills ; and therefore he had no power to give them in payment to Hewit

† *The following is the case put to the merchants, with their opinion.*

*A house in Scotland having a number of bills in circulation at London, sent up an agent (who was a partner in some of their particular concerns), with a number of bills or draughts payable partly to himself, partly blank indorsed by his house. This agent had private instructions from his house that the intention of sending the bills was for paying them to the house of A. B. in order to enable them to make advances in taking up the bills of the Scotch house then circulating at London, and to support the credit of that house there. The agent of the Scotch house had letters of recommendation from his house to the house of C. D. in London, intimating, in general, that he had been sent to London on the business of his house, and to beg their best services to the agent. The agent, upon his arrival at London, finding the house of A. B. failed, pays in the bills to the house of C. D. who immediately thereupon gives him some hundred pounds to account of the bills, place them in all their books to the credit of the Scotch house with them, and undertake to advance to the agent himself, or to his house, the full amount of these bills as their occasions in London should require.*

*But before any further advance is required from the house of C. D. the Scotch house stops, and becomes bankrupt.*

*The trustee for the creditors of the Scotch house, insists, that as the bills were paid in for a particular purpose, which purpose cannot now be accomplished, they or their value should be returned.*

*C. D. admit that the intentions of the parties cannot be fulfilled ; but contend that the Scotch house being due to them, previous to the bills being lodged, a sum equal to their value, now that the bankruptcy has intervened, they are entitled to retain the bills to cover themselves.*

*The opinion of merchants is required, 1. Whether in the circumstances of this case, C. D. have a good title to retain the value of these bills in order to save themselves, and to cover them from the previous debt due to them by the Scotch house ; or, by the mercantile law and practice, must the house of C. D. pay over the value of these bills to the assignees of the bankrupt estate, and content themselves with being ranked as creditors upon that estate for the debt due to them ?*

*2. Would it make any difference in this case, if at the particular period, when these bills or draughts were paid over to C. D. they were not all accepted ?*

*3. Would not the plea of C. D. be equally good supposing at the time the bills were lodged with them, the term of payment of the goods, furnished to the Scotch house, was not arrived ?*

*Opinion.*

*We whose names are subscribed are clearly of opinion ; in answer to the 1st query, that C. D. have an undoubted title, both according to the custom of merchants, and the bankrupt laws of England, to retain the value of the bills to discharge any debts due to them. To the 2d query, it makes no difference whether the bills were accepted or not ; and the answer to the 1st query sufficiently answers the third.*

*London, 31st Jan. 1775.*

*Signed by eighteen Merchants.*

and

In addition to the proof, arising from these cases, that there is no such thing in our law as a general right of retention, may be quoted, the case of the Creditors of Appin, 10th December 1760 \*, where goods having come *bona fide*, into the hands of a creditor, he pleaded retention, but failed.

In our law, then, retention appears never to have been carried farther than consent (express, or implied from the nature of the transaction) authorises.

In the Roman law, the question is understood in the same way as by our authors. It is admitted by Faulds, that, in commodate and deposite, retention had no place: This he at-

and Brockhurst. 2. This inability of Jamieson's voids the transfer. Bills of exchange are no further protected against latent exceptions than as they are indorsed for value; and these clearly were not indorsed for value. 3. The case is even stronger; for Hewit knew of Mr. Stephenson's declining credit, and by address got these bills from Jamieson under the idea that he was merely to get them accepted, while his secret views were to keep them as a security: And this fact was attempted to be made out from certain letters of Hewit's, and from his mode of entering these bills in his books. 4. It is not pretended, that at the time that these bills were deposited, they were meant as a security to Hewit and Brockhurst. Jamieson did not then know that they were creditors of Stephenson's. They were put into their hands (they allowed) to be discounted, and they meant to discount them accordingly; from Saturday when deposited, then, till Monday, they were considered as a deposite. Discounting is generally a momentary operation; but where the business is not completed at first, when the bills are delivered on one day, and the money paid for them on another, during that interval the custody only, and not the property of the bills is parted with. The intervening bankruptcy can make no difference on the question; for, being on Saturday, Stephenson's property, no act of Hewit's could make them his on Monday. The bankruptcy could make a transfer only to the creditors, not to Hewit. There is a most unlimited confidence in the dealings of merchants, bills are trusted to common messengers and inclosed in letters for acceptance. The purposes for which they are trusted must be scrupulously observed, else good faith is at an end.

II. Compensation is known in the law of Scotland, but only between debt and debt, not between debt and deposite. See Lord Stair, B. I. tit. 13. § 8. So far was this carried in the civil law, that it was deemed infamous to retain a deposite. On these principles the Court of Session has often decided. See Fountainhall, 23d February 1697, Scot. Forbes, 16th July, 1709, Creditors of Stewart. Bankruptcy makes no difference. See case of Stewart of Appin's Creditors, 10th December, 1760.

III. The opinions of the merchants produced by Hewit and Brockhurst proceeds on a false case; for, 1. It states that Jamieson was Stephenson's partner, which he was not. 2. It states that he *paid in the bills* to Hewit and Brockhurst, though this be in fact the whole question.

IV. The bills were not lodged with Hewit and Brockhurst, till after the bankruptcy; therefore, if with consent of Stephenson, it was fraudulent in him to consent; if not with his consent the case is no better.

The Court by a very narrow majority found, "Hewit and Brockhurst not 17th Feb. 1775.  
"entitled to retain the balance of the bills in question, but bound to pay the  
"same to the pursuers, trustees for Stephenson's creditors: reserving their right  
"to a part of it, proportionally with the other creditors."

Hewit and Brockhurst having appealed, the decision of the Court of Session 6th Dec. 1775.  
was reversed, and the defence of retention sustained.

Lord Auchinleck Ordinary.

\* See p. 390. of this collection.

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tributes to the gratuitous nature of these contracts, but there is no ground for the distinction. From the passages quoted above, from Voet and Vinnius, it is clear, that retention was admitted for the counter part of the contract only, in *locatio conductio*, and other onerous contracts: even the *exceptio dominii* was found not good; in such cases the title of the possession could not be inverted. See also Voet Lib. 16. tit. 2. § 20. Lib. 20. tit. 2. § 28.

In the law of England, the doctrine contended for by the trustee is well established. An artist there, has retention only for his expence and labour, unless where consent, or the custom of the trade, or usage of the parties, makes a difference. This is clear from the case of *Green v. Farmer*, Burrow's Reports, Vol. IV. p. 2214, and Blackstone's, Vol. I. p. 651. *Ex parte Dieze*, quoted in the last section of Lord Mansfield's speech, in *Green's case*. *Maltby and Son's case* was determined on evidence of the trade, and universal custom. The law of England is not binding 'tis true in this country; but on a point that is not settled, and which depends on no principle peculiar to the law of either country, but affects the trading part of the nation chiefly, and rests on commercial principles, the English law must have weight.

In short, it appears from all these authorities in our law, in the Roman law, and in the law of England, that retention was never carried so far as to create a security by mere accident, and in consequence of the creditors chancing to become possessed of his debtor's goods, without an implied consent either from the nature of the agreement, the general course of trade, or the particular mode of dealing among the parties.

II. The effect of bankruptcy on the claim of retention next deserves notice. Faulds argues strenuously, that even should the right of retention not hold good in the simple case, it must at least become effectual when insolvency begins. It seems a little odd, that this right, not existing before, should start up the moment that third parties come to have an interest. Law ties up a bankrupt's hands for some time preceding his bankruptcy, so that he can give no voluntary security; it would be singular if it should at the same time allow this very circumstance of bankruptcy, to create a partial preference which before had no existence. No instance of such a change can be produced; it is extraordinary indeed to maintain, that a contract of *locatio conductio, commodatum, &c.* is at once converted into a contract of pledge, merely because a separate contract of *mutuum*, for example, remains unperformed.

It may be said, with some plausibility, that a debtor may be barred *personali exceptione*, from objecting to a claim of retention

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tion made by his creditor, though that exception will not be effectual against the onerous creditors of that debtor on his bankruptcy. There are many such cases: An heritable security may be defective in some solemnity; the debtor may bind himself not to object to it, and this obligation will be effectual against him, but it will have no force against his creditors. An adjudication may be objectionable, as containing a *pluris petitio*, for example; this objection the debtor may agree to renounce, allowing the adjudication to be effectual for what is truly due, and in such a case, the debtor would not be allowed to object; yet in a competition the objection would be good. The same is the case with homologation. Though, therefore, an employer insisting for performance, while in labouring circumstances, should be liable to the *exceptio doli*, at the artist's instance; as insisting for performance while he is unable to perform; this would be merely personal, not applicable to the onerous creditors, who lay under no obligation to the artist. This is the view of the Roman law, as appears from *L. un. C. etiam ob. chirog. pecun. pignus retineri posse*. See, in illustration, Perezius in his commentary on this passage. See also Voet, Lib. 44. tit. 4. § 2. Now creditors under the bankrupt statute are more favourable than the secundus creditor. To give retention in such a case would be to give to a creditor a security he never bargained for; a preference over creditors, whose stipulated security was the same with his. It has been said, that to deny it, would place him in a situation worse than other creditors: but he may do diligence in another name; he can in his own name execute a poinding; and he has better access than others to know where the goods are. It is said to be unjust to force performance of the artist's engagement, while the debtor is unable himself to perform; but it is injustice in the bankrupt not to perform his obligations to all his creditors, and where the contracts are unconnected, and not counter parts of each other, they must be judged of each by itself; and there is no greater favour due to this debtor, merely because he happens to be creditor in another debt (which must stand on the security on which it was contracted) than to any other debtor or creditor of the bankrupt.

So far from the creditors being in the same situation with the bankrupt, the very object of the bankrupt laws is to secure the creditors against such acts or deeds of the bankrupt as can create a partial preference.

It has been said, that the creditors must take the estate as it stood in the bankrupt, liable to every incumbrance and lien attending it. The subject in competition is the *ipsum corpus* of a moveable subject, the property as well as the civil possession of which remained with the owner till the instant of bankruptcy, and at that instant was transferred by sequestration, which

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which is a compound of all diligences) to the trustee for the creditors. Had this been a real lien for separate debts, as well as for the expence, they must have come to the trustee, subject to that burden; but as a latent and personal claim, it cannot affect the statutory transference.

It has been argued, that there can be no effectual transference of moveables without delivery; but there are many cases in which possession is held to be given without actual apprehension of the subject, as the key of a warehouse, the titles of a ship, bill of lading. See *Buchanan and Cochran v. Swan*, 13th June 1764, *Kaimes's Select Decisions*, No. 216, where the indorsement of a bill of lading, was found an effectual delivery, and *Kaimes*, in giving the reason of the decision, says, that wherever goods are in another's hands, with the consent and for the use of the owner, bare consent is a sufficient transference; and he instances the case of a block of marble in the hands of a statuary; *Hastie and Jamieson v. Arthur*, 10th April 1770, House of Lords; *Clay and Midgely v. Coulter*, in the same year; and *Bogle v. Dunmore and Company*, 2d February 1787. It is the same with goods in the custody of a bleacher.

*Faulds*, in support of this branch of his plea, referred to the case of *Lees v. Dinwiddie*, and of the Creditors of *Magbiehill*; but in these cases the goods had come into the creditors possession, not by accident, nor by contract implying an obligation to restore as soon as a certain object for which they were placed in his hands should be accomplished; but by diligence. See *Bankton*, B. V. p. 495. § 35. As to *Magbiehill's* case, a formal poinding by the creditors, instead of an arrestment, would clearly have cut out the right of retention; but a sequestration is a poinding, and a compound indeed of every diligence.

## Opinions.

*Lord Dregburn*.—I have difficulties in forming an opinion on this case. The right claimed by the manufacturer is not a constituted, but a resulting right; founded on possession and regulated by it. The *exceptio doli* struck me; but it does not affect creditors, which is the case at issue. The question is of great importance. The right of retention would, if carried to the full extent of the pursuer's plea, affect heritable rights, as well as moveables (putting the records out of the question). An adjudger might claim possession, till he should be paid, not merely the debt for which the adjudication was led, but every debt due to him by the proprietor of the lands. No author has treated fully of the question of retention. Retention is not a pledge, nor a lien, but the mere result of possession; since, if an artificer lose possession, he loses his right of retention, even for expences; nor can he recover possession as  
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in a lien, where he has an *actio in rem*. This claim is unquestionably good for the expence of labour, Dict. Vol. III. But, in considering the farther extension of it, it must be obvious, 1. That there can be no claim of retention where it is expressly excluded by the agreement. 2. That it may be excluded by the situation of the debt. A watch-maker, for example, is pursuing for a debt, which is denied, and under discussion in a court, and the alledged debtor, sends his watch to be repaired; it cannot in these circumstances be supposed that the debtor meant to give his watch in payment of the debt, for he is at the time strenuously denying it: neither can he be presumed to have intended to give it as a security. 3. It is clear that retention may be excluded by the situation of the parties, or by the circumstances under which the goods came into the hands of the person claiming retention. See the case of Campbell in 1781, where a person receiving money as a trustee was found not entitled to retain it in payment of a debt due to him by the truster. In the same way if a jewel be put into the possession of a jeweller to be set, *ex presumpta voluntate* the possession must be restricted to that particular act; there is an exclusion of retention by the very nature of the agreement. Were there in our law a general right of retention for all debts, we should find it restrained by numberless limitations—"Nemo potest mutare suam possessionem," is a rule admitted in our law, and unless something be done to alter the possession, it must remain as at first. The *L. unic. C. etiam ob chirographar. &c.* was a new law. The older law is more to be respected. A man does not seem *improbe facere* who pays the sum for which a pledge is constituted. It is said that a person in possession is in a worse situation than any other creditor; but this is by no means the case, he may do diligence in the name of a trustee, or deposite the goods in the hands of a third party, and carry on the diligence in his own name. Compensation is out of the question; retention depends on the terms under which the property comes into the hands of the holder. Without pronouncing on the general point, it strikes me, that when an artificer receives goods to be wrought, he has a claim for no more than the expence of the labour; by no means for other debts.

Lord Hailes.—The decision in the case of Magbiehill is bad. If retention, to the extent claimed, be allowed, it will give an opportunity for fraudulent preferences by bankrupts, in contempt of the acts of parliament. A debtor wishing to give a preference to his neighbour, who is a creditor, may open the door of his field, and allow his cattle to go into his neighbour's inclosures, and he may pound them; having thus acquired possession, he has a right of retention for every debt, as

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well as for the value of the damage done. It would not be easy, in such a case, to prove collusion.

*Lord Gardenston.*--I am of the opinion already delivered. When I came to consider the point really at issue, I was greatly moved by the consequences of this new doctrine of retention. It would prove equally dangerous to commerce, as to the fair distribution of the property of bankrupts; for nothing is more common, than for merchants to dispose of their goods, before they come from the manufacturers: In this very case, the goods were sold when in the field. The property, in my opinion, remains in the person who lodges the goods with the artificer; and when in this situation he sells them, the purchaser, though he may be presumed to know that the price of the manufacturer's labour will be a burden on the goods, cannot suppose that they are incumbered with any further claim. When, in this case, the goods were sent in the 1788, the bleacher had a right of retention for the expence of bleaching that parcel: But by giving up his possession of it, and receiving a bill for his bleaching account, he renounced his right of retention. The bill came then to be his security, and he came to be in the same situation with any other personal creditor. Now this goes to the principal part of this question; for if the retention was really given up by the accepting of a bill, it is incomprehensible how this right of retention should revive, and attach on a new subject. Even had there been no bankruptcy the plea would have been a bad one; by giving up possession of the first parcel of goods, the right of retention over them was lost. In illustration, suppose that a person sells 500 bolls of meal, on a ready-money bargain, if the purchaser comes with the money the seller must deliver; if with a bill, the seller may refuse: But he takes the bill, and delivers up the meal; the purchaser makes a new bargain next season, and pays ready money for his second cargo, the seller cannot retain this second cargo, in security of the price of the former, which still remains unpaid. In the same way a shipmaster has a right of retention for his freight; but if he gives up the goods, he cannot renew his claim of retention over other goods of the debtor, which may afterwards come into his hands as a shipmaster. If the right of retention, in its full extent be admitted it must affect heritage; and a tenant, who gets into possession of a farm, and who is at the same time creditor to his landlord, may, at the expiry of his lease, claim retention of the farm until his debt be paid. A case occurred lately, where, had there been a right of retention to the extent here claimed, the claimant must have prevailed: A proprietor of a small subject in the neighbourhood of Arbroath, sold it; he gave the purchaser a disposition and infestment, and admitted him to the possession without receiving the price; a little after, the purchaser became bankrupt, and a ranking of his credi-

creditors having taken place, a claim was entered for the seller: But the Court denied him any preference. This decision I apprehend to have been pronounced on this ground solely, that the seller having quitted possession, had renounced his right of retention. I am happy to coincide with the opinion of that very respectable judge, Lord Mansfield, in the case of *Green v. Farmer*.

Lord *Dunfinnan*.—I am against retention.

Lord *Monboddo*.—was clearly for retention. The civil law, he considered as the common law of all Europe, and especially of this country. Voet, (§ 20. *de Compensatione*), lays down a great distinction betwixt compensation and retention, in which he gives retention the preference as the stronger right. The exceptions from the general right of retention are clearly laid down in the civil law; they are in cases of gratuitous contracts as commodate and deposit; and these very exceptions show the general rule to stand clear. The text of the civil law, *L. un. C. etiam ob chirographar. &c.* contains a decision in a very strong case. Pledge implies, that when the debt is paid for which the subject was impledged the subject must be delivered back. The *primus* creditor, had the principal pledge, the *secundus* creditor had a secondary pledge over the same subject. The exception was not good against him, for his right was real and preferable. Compensation and retention are the same in principle; the ground of equity is this, that a person is not obliged to pay a debt while the creditor is at the same time due something to him. If the claims be of the same nature, it is called compensation; if different, it gets the name of retention.

Lord *Swinton*.—Compensation and retention are the same; with this variation, that compensation can be proponed only in liquid claims, retention takes place whether the claims be liquid or not. Retention should always be allowed where there is no fraud. It has been said, that the defender has lost his right of retention for the first parcel, because he parted with the goods: But he had reason to expect that more would be put into his hands; he accordingly did receive more, and over these he now claims retention. I conclude in the words of Lord Arniston in *Magbiehill's* case, that he may lawfully retain the goods which have thus come innocently into his possession, till he get payment of the former debt.

Lord *Eskegrove*.—Though many inconveniences may ensue, I am of opinion, that, by the law of Scotland, retention is competent. I assume it as a principle, that the law of Scotland is a branch of the civil law, especially with regard to contracts: it is enough, therefore, if the civil law establishes the principle of retention; and both compensation and retention were received in that law. They are founded on a principle of com-

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mon justice between man and man; not the creature of statute. They must have been recognised in our law long before the statute 1592, which only allowed the principle to operate by way of exception. Before that act, had two parties come, each with a decree in his hand, must both have gone to prison? Surely not; or could this have taken place, though one was a decree for delivery, while the other was a decret for payment? It cannot be. Retention must have existed before the act of parliament; the case from Balfour proves it. By the civil law, there was always retention, when not excluded by the nature of the agreement, or the law of the country. As to land-rights, neither compensation nor retention is there admitted, and this proceeds from the influence of the feudal law; hence, in the case of first and second adjudications, the second adjudger is obliged to pay the debt of the first, before he can obtain possession; but he is not obliged to pay any other debt than that for which the diligence has been led. In like manner, there can be no retention in wadsets, further than for the debt in the wadset; neither can a tenant hold possession *via retentionis*, beyond the terms of his lease. There can be no difficulty where the question occurs betwixt the debtor and creditor, the one holds the goods, the other the money; and payment cannot be demanded of the debt without delivery of the goods. There is no distinction betwixt this case and that of a factor; a factor is creditor in a debt contracted before the existence of his factory, or acquires a debt of a prior date; this man is entitled to retention until these debts be paid, and this can proceed on the general principle of retention only. Retention of writs, as an hypothec, should go no farther than for business done in relation to the papers over which the claim is made; but it has been carried a greater length. A cautioner is allowed retention of a debt until relieved of his cautionary obligation. No doubt where goods have come into the hands of a person *bonis fide*, but without the consent of the owner, there is no retention: There is a case, in which I was counsel, but which I regret much has never been collected, and the more so as I have omitted to mark the opinions of the judges; it was decided 5th March 1761, betwixt the Creditors of Williamson and Yetts. Williamson, a shipmaster, was son-in-law to Yetts, who was a merchant in Leith, and had ware-rooms and places for receiving goods; Williamson had been in the practice of depositing his goods with Yetts, who disposed of them on his account, and he was due to Yetts L. 100. Williamson, in returning from Holland, met the trade from London to Leith at sea, and put on board of them some goods which he might himself have found it difficult to land in safety. A storm arose, Williamson was lost, but the Leith trade arrived in safety. The person to whom the goods were committed, without any special orders

orders from Williamson, but merely from knowing his connection with Yetts, and his known custom of depositing his goods with him, immediately on their arrival at Leith deposited them with Yetts on Williamson's account, whose misfortune was not then known. When the news of Williamson's death arrived, Yetts never thought of arresting or poinding, or using legal diligence of any sort, for securing his debt: But sold part of the goods, and trusted to his right of retention as a sufficient security. Some creditors of Williamson's, however, arrested in the hands of Yetts; a competition arose, and the arresters were preferred by a majority of five to four. Arniston, and three others, voted in favour of retention, and there were three who did not vote. I understood the idea of the Court to have been, not that retention was unknown in the law of this country, but that in this case it was not to be admitted, as the property had not come into the possession of Yetts, under the authority and with the consent of the owner. I always understood retention to be admitted in our law. I know nothing of the law of England, but as the civil law is not received there, retention does not seem to exist, unless under an express regulation. Where retention is claimed on conditional debts, it ought to be refused; for if the condition should not be purified no debt can ever exist. But there is an exception where the debtor is *vergens ad inopiam*, and so far have the decisions gone; for they have ordered caution to be found in such cases. Compensation operates against an onerous assignee, but this does not affect commerce; for the case of a bill of lading, and a bill of exchange, are made exceptions by the decision of the House of Lords. If so, retention must operate in the same manner, and with equally little prejudice to commerce. It does not weaken the claim of retention, that it happens to occur with an arrester, or poinder, or with creditors. Bankruptcy gives no better right to creditors, than the bankrupt himself had, but it has the effect of preventing undue preferences granted within a limited time; a bankrupt can give no security nor pledge: Suppose then, that in the present case, the merchant had meant to give a security for debt, by impledging the goods in the most formal manner; if the deed or covenant had been entered into within sixty days it would not have been good. I cannot give effect then to this claim, in so far as the goods came into the hands of the manufacturer within the sixty days, since at that time even the most formal covenant would not have been effectual. The expence of the labour is in a different situation; that is a new claim, and saved, as such, by the act 1696. I am therefore, upon the general point, for admitting retention.

Lord Justice Clerk.—In all contracts, nominate or innominate, there are certain obligations express or implied in law, and

C A S E

1.



and arising from the contract; and it is a general rule, that parties to a contract are entitled to specific implement of it. In commodate, there is an *actio directa et contraria*; there is a precise obligation: The *commodatarius* is bound to restore the subject in the situation in which he got it; the lender may demand specific implement, and though the Roman law did not give the *actio contraria*, in this contract, by way of exception to a demand of delivery, yet the rule of the law of Scotland is, that the *actio contraria* always meets the *actio directa*. The idea of the law, before the 1592 was, that if a person borrowed L. 100 to be paid in three months, this contract was not to be embarrassed by the introduction of any other; where there were counter-claims; they resolved into a count and reckoning, which was competent prior to the 1592; that act was introduced to save the trouble of bringing two actions. I have no idea that a person pursuing for implement of a contract, where the conditions of that contract are clearly expressed or defined by law, and known to be inherent in the contract, can be denied action; the claim is not to be incumbered with any other contract; nor is the claimant to be forced into a count and reckoning; were it so, commerce could not be carried on. If a person for instance, give yarn to a manufacturer for the purpose of weaving it into linen, and returning it when the operations are finished; the manufacturer cannot retain the yarn, on the footing of his having counter-claims against the person from whom he received it; for when a person enters into a contract, it must be specifically implemented; in the law of Scotland both parties must perform their respective parts. Suppose I purchase and pay for a moveable, and the merchant should chuse to say, "I will not give up my right of retention, nor deliver the subject into your hands, until you account to me for what you were formerly due:" He would be urging a plea not allowed by the law of Scotland: Accordingly, when our writers speak of retention, they never carry it farther than to the extent of the *actio contraria*. Bankruptcy makes a material change; then, there can be no farther transactions with the bankrupt; every thing is suspended, and the interest of the bankrupt, and of each of his creditors, must be ascertained by a count and reckoning. When the trustee makes his demand for the general behoof, compensation may be pleaded, if the counter-claims be liquid; or if the creditor have goods in his possession, he may plead retention. Justice will not permit, that I be forced to deliver up goods which I hold, and trust for the recovery of my debt, to the funds of the bankrupt, which may yield little or nothing. In a bankruptcy all the claims of the debtors, are to stand in opposition to the claims of the bankrupt; the one obligation cannot be de-

demanded without performing the other. When parties are going on in business, one contract cannot be confounded and embarrassed by the introduction of another; but when bankruptcy happens, all transactions are at an end, and a general count and reckoning must take place. Thus compensation is competent before decree, but cannot be pleaded after it; not even where the decree has been in absence, unless in the case where the person against whom it is pleaded, is *vergens ad insolvendam*; and there it is allowed, because otherways, the person to whom the claim is competent, might be totally deprived of it. Retention, and a general count and reckoning, would be a bar to the proper conducting of business; but it is a rule in material justice, that where bankruptcy happens, this plea must be received: the expediency that denied it in the former case has then no existence. As to Magbiehill's case, Arniston, though a great man, was wrong: "*aliquando bonus dormitat Homerus.*" The goods did not come regularly into the possession of Magbiehill; he was answerable for those he employed, and the poiding being irregular, it was a spuilzie. If that decision be good, there can be no distinction betwixt a good poiding and a bad one. Arniston's reasoning seems to be no better in this case, than that of the other judges; for retention, when it takes place, must be effectual against both arrestments and poidings. Heritable subjects have no similarity to the case of moveables, they are incapable of actual possession, the possession of them is merely symbolical; in moveables possession is the title, but in heritage the title is a charter and ratine: hence the right can be no broader than the title; it refers to it, and is bounded by it; a person in possession on an heritable bond, has his possession defined by the terms of that bond, it shows the nature of the right. It is in heritage, therefore, that the rule, "*non mutandam esse possessionem,*" applies, and there only. The bankrupt statute vests every thing in the trustee; had it, like the vesting act in 1745, a retrospect, it might be a question how far retention could be pleaded against the trustee. But this plea of retention is proponable on bankruptcy, and bankruptcy must take place before there can be a sequestration, or a trustee appointed: so that the right of the creditor emerges before the existence of the trustee's right, and he must take the claims of the bankrupt with all their burdens. I am for retention.

Lord President.—We have the term retention from the civil law. I conceive it to mean a right of refusing delivery of a subject, till the counter-obligation under which the subject was lodged, be performed. It is acknowledged by all our authors and decisions: Mutual obligations must be performed *hinc inde*; and so retention arises, from the very nature of the obligation,  
to

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I.

to the extent of the price of the labour bestowed: therefore, I think the claim good to an artificer to this extent; it is the counter-part of the *conductio operarum*. But the goods are delivered for a precise and special purpose, and for no other; there is no idea of transferring the property, nor of giving it in pledge, nor of transferring even the possession in a legal sense: the artificer has the mere naked custody of the goods; the civil possession is with the owner: the actual possession or custody may be with him too. Suppose that the goods, in the present case, had been bleached on the owner's ground, the artificer, working there, would have had them in his hands for the purpose of bleaching them; but could not have carried them away: he would have been a mere servant only, with a right perhaps to lay hold of the goods for the price of his labour, but clearly nothing more. In the present case, the principle is the same; for the expence of bleaching he has a real right, a lien, which entitles him to refuse delivery to the owner, or to any one in his name, till paid his expence; and that lien is preferable even to the King's right of extent. The great question then is, whether the custodier can detain, not only for such expence, but also for separate debts; that is, whether he be entitled to take a more ample and beneficial possession, than was stipulated at first? The artificer has clearly retention for his expences: But it is said, that besides this he has an *exceptio doli* against delivery, till all other debts be paid: If this be true, it must operate in every case where a man has any hold of another's goods, and at the same time has a debt against him; it must be unlimited, because it pervades every case where there is a *rei interventio* of tangible subjects; it must apply to heritable subjects, (laying charter and saine out of the question,) for I can see no distinction of subjects but what arises from the feudal law; and therefore it would apply to the case of a tenant having possession under an expired lease, who might equally insist upon retaining the subject for general debt: Yet we find no lawyer who has spoken of retention in this broad and general sense. The only argument from the Roman law, is founded on the word "*precipue*," in Voet. This only means, that there is some other kind of retention than that for the expence bestowed. Take the case of *locatio conductio*, where retention is not excluded by considerations of friendship, &c. as in *depositum*; in that case, can it be sustained beyond the expence bestowed? I see no authority in the text of the Roman law, nor in the commentators, to determine this in the affirmative. L. 48. § 31. ff. Loc. Con. See also Voet, who says that the conductor is an *invasor possessionis*, if he retain after the purposes of the contract have been completed: he cannot even insist on retention  
for



for his expences, if caution be offered ; so strong is the rule that goods must be restored as soon as possible. These observations I think conclusive of the question betwixt the contractors themselves ; the possessor cannot invert his possession, given for a certain purpose, to a purpose totally different, without consent of the owner. The case of an artificer is still less doubtful than that of a conductor : In the latter case, the use of the subject is given ; in the former, no use is given, not even possession : there is a specific obligation to restore, which cannot be opposed by claims unconnected with it. Is there any occasion for a count and reckoning, in order that I may have back my goods ? Surely not : a summary application to the sheriff will force them back. Is the artificer in a worse condition, because I prefer him in the manufacturing of my goods, than he would have been otherways ? No ; his debt remains with all the security he originally stipulated. The *dolus* is on his side, if he refuse to deliver my goods which he has specifically bound himself to do. It has been said, that a difference arises where the person is *vergens ad inopiam*. But I must observe, that this is a very loose and undefined phrase ; it is explained properly by Lord Justice Clerk, when he uses the word bankruptcy. Retention, taken as an equitable extension of the right of compensation to the case of illiquid debts or claims, ought to be effectual where a party is *vergens ad inopiam* : But cases of retention of this kind, (as some of the decisions are), have no connection with the retention of the subjects, which this creditor happens to have in his hand. If Lord Justice Clerk had pointed out a single case, where *vergens ad inopiam* had operated, in converting the possession from a specific contract, I would agree with him ; but it would be singular, that what was not in any view a lien before bankruptcy, should, at the moment of bankruptcy, be converted into one. How would the act 1696 have affected such a security if expressly made ? If it would have rendered it bad, it must prevent a tacit security of the same nature from being established. Bankruptcy can make no difference, the case is the same after bankruptcy as before it, the property is in the creditors, so far as not excluded by a lien. Can it be said, that because a person has become incapable of performing one obligation, he cannot ask performance of another ? Is a poiding to be opposed with effect by the claim of retention ? You may oppose it by swearing that the goods are yours, that they are impledged to you, &c. but surely not by saying, you are a personal creditor ; the answer would be, “ if your poiding be  
“ ready ; I will join with you ; if not, bring your action and  
“ raise your diligence, but, in the mean time, you wont hin-  
“ der me from poiding.” Sequestration transfers as much  
as can be transferred ; it carries the property of the goods, as

## CASE

much as a voluntary sale with possession; as completely as a poiding: indeed more so; for a poiding is liable to the retrospect of thirty days, as mentioned in the act, sequestration is not. It is said, that there can be no effectual transference without delivery; the answer is, that though in general a sale is incomplete without delivery, there are many *brevi manu* deliveries, very different from actual delivery; such as a key for the delivery of a warehouse, an indorsation to a bill of lading for the delivery of the cargo, &c. The principle of all these is, that the person having the goods is merely a custodier for the seller, and the seller gives all his right, to demand these goods from the custodier. See the case of Buchanan, 13th July 1764. Hastie and Jamieson v. Arthurs.—Dunmore, and Company, 2d February, 1787. Stewart, 2d December, 1766; where I was taught by Lord Pitfour's opinion, that Magbichill's decision was bad. 10th December 1760, Appin's Creditors, where retention was not sustained. Hewit's case has been fully explained: the question turned on this, whether had Jamieson power to deliver the bills to the effect of placing them to the credit of the person, entrusting him with them? It was found in this Court to be wrong in Jamieson, and a fraud in Hewit; but the House of Peers, saw it differently, they thought that there was no fraud. But suppose, that these bills had been destined to a particular purpose, and that this purpose had been defeated, I have no doubt that they would have decided otherways. This is clear from a noble and learned Lord's having expressed himself in another case, as of opinion, that retention was not acknowledged by the House of Peers in Hewit's case. As to factors and cautioners, it is laid down, that there is retention of the moveables which come into their hands; then suppose that the bleacher, instead of a creditor had been a cautioner, would this make any variation? It can make none upon the present question; the principles which regulate factory or cautionry do not apply to other contracts. Suppose a furnished house in Edinburgh let for a year, it is implied, that the tenant must remove at the end of that time; he cannot pretend to carry away the furniture: nor can he defend against a removing, either from the house or furniture by objecting a debt. He has possession only for a certain time, and at its expiry he must remove; he may retain rent in compensation, but no more. Retention is a more extensive and dangerous right than compensation, where bankruptcy occurs. Compensation operates *retro*, and a balance is struck, for which alone the creditor can rank. Retention is different, it does not extinguish *pro tanto*, leaving the creditor to rank merely for the balance, but he retains the subjects, and, instead of ranking for the balance, ranks for the whole debt until he is paid up, either

ther by his dividend, or by that joined with the produce of his collateral security. C A S E  
I.

State of the vote. Sustain, or Repel the plea of retention.

Sustain, Lords Justice Clerk, Eskgrove, Swinton, Rockville.

Repel, Lords Stonefield, Hailes, Gardenston, Ankerville, Dunfinnan, Dreghorn.

Lord Alva left the Court before the vote was put : The vote of the Lord President was not required, but his Lordship was for repelling.

“ The Lords having advised these informations, and heard  
“ parties procurators in their own presence, they advocate the  
“ cause ; repel the plea of retention pleaded for the defender ;  
“ find, that upon the pursuer’s making payment to the defen-  
“ der of the sum of L. 17 : 6 : 10, the sum due for bleach-  
“ ing the goods in question, he has a right to the promissory-  
“ note, now come in place of the said goods.” Judgement.  
Jan. 27. 1791.

A reclaiming petition was presented for Faulds, to which answers were given in, upon advising which, the Lords adhered.

For the Trustee, Mr. Solicitor,  
R. Cullen, }  
For Faulds, Dean of Faculty, } Advocates.  
Dav. Cathcart, }

J. Dillon, }  
J. Stewart, } Agents.

Lord Justice Clerk Ordinary.

Sinclair Clerk.

Vol. VIII. No. 6.

## R U N R I G G.

JAMES BRUCE of Kinnaird, Esq; Pursuer,

A G A I N S T

JAMES BRUCE of Powfoulis, Esq; and JAMES Bow, Tenant  
of Powfoulis, Defender.

It is not necessary to call tenants in the division of runrigg-lands.

## C A S E

I.

A process of division of the runrigg-lands called the Haughs of Airth was brought by Sir Lawrence Dundas of Kerse in the 1771, in this process the proprietors of the lands only were called. It was not till March 1790 that a decree of division was finally pronounced; and Mr. Bruce of Kinnaird, one of the proprietors, being desirous of getting access to his share, brought an action in the 1791 for reducing the leases granted by Mr. Bruce of Powfoulis, in so far as they affected the share to which he was now entitled, and concluding for summary removing against the tenants, and for damages for the want of his possession.

In this action appearance was made for Mr. Bruce of Powfoulis, and James Bow his tenant; and the question came to be, whether in a division of runrigg-lands, it be necessary to call the tenants in these lands? for if the tenants ought to have been called, this division was erroneous, and the pursuer's plea ill founded. Upon this point the following opinions were delivered.

## Opinions.

Lord Justice Clerk.—There is no doubt that a tenant has an interest in a division of runrigg, but still it is not necessary to call the tenant in a division of runrigg, more than in a division of commonry; for in both cases, the interest which the landlord has in the action, is a sufficient safe guard to the tenant. I shall suppose that a tenant is bound by his lease to pay the public burdens imposed, or to be imposed on the farm; you would not think it necessary to call that tenant in a process of augmentation, at the instance of the minister, from this interest which he may be supposed to have in the augmentation. The idea of the law is, both in that case, and in the present,  
that

that the landlord will take care of the interest of his tenant, which is in fact his own interest. As to the right of possession after the decree of division, I have no idea that a tack entitles a tenant to possess those lands, which happen to be allotted to another heritor. Where the decree of division is pronounced, there is no occasion for a warning, the ground allocated to a tenant comes in place of the ground which has been taken from him; the one is held to be equivalent to the other, and continues his, during the currency of his lease. It does not therefore enter into consideration, whether the lease be current for a long or for a short period; if the tenant shall withhold possession, a common action before the Judge Ordinary, concluding for having him removed, is the proper remedy.

Lord *Swinton*.—I cannot go so far as the Lord Justice Clerk has done; for I think, from the words of the act, as well as from the reason of the thing, that a tenant has an interest which renders it necessary to call him as a party in a process of division of runrigg-lands. But we are relieved from deciding that point upon this occasion, as the words of the law are, that all concerned at the time shall be called, and here the tenants were not in possession when this action was first brought, and consequently there is no occasion for calling them now. The tenant, if he has really suffered damage, may go to his landlord for redress, on the clause of warrandice in his lease.

Lord *Hailes*.—The expressions in the act do not refer to the interest which a tenant holds, but to that of a liferenter.

Lord *President*.—Had the lease commenced before the action of division was raised, there would have been some difficulty in saying, whether the tenants ought, or ought not to have been called. All concerned, that is, all having interest, are directed to be called; and certainly tenants have an interest, and consequently ought to be made parties to the action. But this cause appears to me in the same light in which it has done to Lord Swinton, that there is no occasion to decide this point, as the tenants were not in possession when the action commenced; and although they were in possession, when it was awakened, yet it is not customary to call any other parties in a waking than those who were originally parties to the action. It has been decided, that four acres should be held the greatest quantity falling under the description of runrigg; and although this has been decided perhaps rather arbitrarily, yet I see no reason, now that the rule is established, why it should not in future be observed, here the parcels in dispute are under this quantity.

Lord *Justice Clerk*.—I have no idea that it is necessary to call tenants in actions of property, though their interest may be affected. I shall suppose that a man gets possession of an estate upon a bad title; the right is called in question, and if it be  
redu-

## R U N R I G G.

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that

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that the landlord will ...  
which is in fact ...  
after the death of ...  
attendant to ...  
to ...  
the ...  
for ...

## C A S E

I.

An action was brought against the horse-jockies, for repetition of the price, when the Lord Ordinary found, “ That at  
 “ the time of the sale, the defender, Ainslie, gave a false ac-  
 “ count of the blemish which was observed on the eye of one  
 “ of the horses; that the purchaser, had received considerable  
 “ information as to the defect of sight in both of the horses:  
 “ But in respect, that by the receipt produced, the defender  
 “ Ainslie had warranted the horses free from blindness, and  
 “ that previous to the sale, both of them laboured under a de-  
 “ fect of sight, which was known to the defenders, that the  
 “ defenders were bound to take back the horses, and to re-  
 “ store the price.

This question came before the Court, upon a petition reclaiming against this judgment, and answers for the pursuer; when the following opinions were delivered.

## Opinions.

*Lord Swinton.*—There is a clear warrandice against blindness: But still I have a difficulty in adhering to the judgment. Previous to the bargain, the purchasers knew that the horses had been threatened with blindness. The disease made its appearance in July, but no notice was given to the horse-dealers till November. These people were entitled to have had the horses instantly returned; and in the same state of blindness in which the disease was first discovered. But, in place of this, the pursuer tampers with the horses, and employs a horse-doctor. The pursuer ought to have returned the horses instantly. It is there that my difficulty lies.

*Lord Eskgrove.*—The principle laid down in the interlocutor is sound; yet I have the same difficulties which affect Lord Swinton. This is a question about blindness, which was known to exist previous to the sale of the horses. I have no great favour for horse-jockies; yet, after acknowledging that the horses had been diseased, and considering that they were sold for L. 60; when, had they been sound, they would have drawn L. 90 or L. 100, I must consider this receipt with the warrandice, as most unreasonable. What is the consequence of this warrandice? was it to continue for the lives of the horses? It appears to me, that the horse-jocky ought to be relieved from this bargain, from the mere length of time for which the warrandice was to continue. It was a bargain which never ought to have been entered into. The disease first appeared in July, or August; and in place of doctoring the horses (and improperly too), the pursuer should have sent them back to the defenders. But this was not done for a considerable time. The extent of this warrandice must be circumscribed within a reasonable period.

*Lord Justice Clerk.*—I am very clear, that these horses were not in a sound state at the time of the sale. It was on this  
 account

account that the obligation of warrandice was taken; and had this gentleman applied directly to the defenders, without going to the north-country ferrier, the defenders must have taken back the horses. But I have great doubts if the defenders can be forced to take them back months after the disease appeared, and when, during the intervening time, the pursuer continued to work the horses.

*Lord President.*—The purchasers knew the state of the horses better than the sellers seem to have done; and it was on account of the blemish, that a less price was given. The warrandice, in such a case, must mean that the horses have no disease, but what is apparent; and surely it is not a warrandice which is to continue for the space of ten years. But whatever may be in this, the conduct of the pursuer, and his keeping the horses after the blindness was discovered, are sufficient to take off the obligation of warrandice, and to make him liable for any loss that may have happened.

*Lord Henderland.*—It appears from the proof, that these horse-jockies gave a false account of the disease in the horses eyes; it appears also, that Riddle the ferrier was of opinion that the disease would end in total blindness; and this opinion he must, I think, have communicated to the defenders, who were at that time the owners of the horses. It appears, on the other hand, that the purchasers were very highly pleased with the appearance of the horses, they made enquiries about them, and in this situation, they would naturally be inclined to believe the good, and to disregard the ill: they seem indeed to have been nonplussed, and uncertain whether the disease was one that was to be got the better of. They were ignorant that it was the opinion of men of skill that it would end in total blindness; and they took this obligation to free them from any danger. The blindness which afterwards came on, was only a continuation of that disease which the horses had at the time of the sale. It was upon these facts that my decision was founded. But the ground which your Lordships have taken up, is the delay which took place in returning the horses after the blindness appeared. But I see no reason for altering the judgment which I pronounced.

The Court reversed the judgement of the Lord Ordinary, and dismissed the action.

Judgement.  
June 12, 1792.

Upon the point of expences, the Lord Justice Clerk said that he was for no expences against the pursuer. The defenders had been guilty of a wrong, and had the horses been returned in time, they must have taken them back. The pursuer seems to have been pleased with the horses, and to

C A S E

I.

have tried every means for their recovery before returning them, in doing so, he has lost his recourse : But I am not for expences.

Expences were not given.

For the Pursuer, Ad. Rolland, } Advocates. Ja. Watson, C.S. } Agents.  
Defenders, Mr. Solicitor, } J. Wauchop, C. S. }

Lord Henderland Ordinary.

Colquhoun Clerk.

Vol. IX. No. 10.

## S E R V I C E.

**The Reverend Mr. ANDREW JEFFREY, and Others, Creditors  
on the estate of Beltenmont.**

AGAINST

**DAVID BLAIR of Beltenmont.**

Where a person means to serve heir *cum beneficio inventarii*, and the inventory is made up and recorded within the year, although the service does not proceed within that time, he does not incur a passive title by intromission with the rents of the estate.

BRYCE BLAIR, proprietor of the lands of Potterflatts, was married in the 1747, to Jean Scott heiress of Beltenmont. By the contract of marriage the lands of Potterflatts were provided to the heirs of the marriage, under the burden of a life-rent annuity to the widow of L. 20 Sterling; and the estate of Beltenmont was settled on the husband and wife, in conjunct fee and life-rent, and the heirs of the marriage in fee; whom failing, the heirs of the wife's body in any other marriage; whom failing, the heirs or assignees whomsoever of the husband.

The marriage was dissolved by the death of Bryce Blair in the 1762, of which marriage there were three sons, George, William, and David. In the 1773, George Blair, the eldest son was served heir to his father's estate, as nearest and lawful heir, and to the estate of his mother, as heir of provision under  
the

the contract. George Blair died in the 1775, and the next son, William, made up titles to the estate of Beltenmont by a service *cum beneficio inventarii*. The inventory contained the whole subjects which had belonged to George; but no title was completed to the estate of Potterflatt; so that it continued *in hereditate jacente* of George. William died in the 1777, when the succession devolved on David Blair the youngest son, and the party in this question. David, who was in the army, and about to leave this country, executed a trust-deed, directing that he should be served heir *cum beneficio inventarii*: That the estate should be sold for payment of the creditors of his father and brother, and the names of the creditors were inserted in the deed of trust.

The inventory was made up and recorded in the county where the lands lie, as well as in the register of inventories at Edinburgh, within six months of William's death. In this inventory, there was included not only the estate of Beltenmont, to which William had made up titles, but the whole estate to which William had right as apparent heir of his father, or of his elder brother George; and the inventory bore, that 'it was made up, in order to David's being served heir of line to William his brother, or others his predecessors, *cum beneficio inventarii*.'

The trustees had advertised the estate for sale, and within two days after the inventories were completed, they sold two small lots, obliging themselves to make up the seller's title as heir *cum beneficio inventarii*. But the creditors disregarding these proceedings, led adjudications, and brought the estate to a sale. Upon the appearance of these measures, the former sales were given up by the purchasers, and the trustees took no step to complete the titles to the estate in the person of their constituent David Blair.

In the ranking and sale, there was produced for David Blair, the following interest:—1. An heritable bond for 2500 merks, by James Scot of Beltenmont, to Mr. Thomas Cowie minister at Annan, dated in the 1731, with conveyances thereof.—2. An heritable bond by George Blair to his mother, for L. 800, dated in the 1773.—3. An heritable bond of annuity granted by George Blair to his mother for an annuity of L. 20, dated in the 1774.—4. Bond of corroboration by William Blair, accumulating the first and second debt to the sum of L. 1036, 2 s. 2 d. Sterling, in the 1776.

To this interest it was objected, 1. That David Blair the claimant by his behaviour as heir had incurred a passive title, and consequently was barred from competing with creditors, to whose claims he was personally liable. 2. Particular objections were stated to the grounds of debt.

## C A S E

1.

July 21, 1789.

The Lord Ordinary, before whom this question came, made avifandum to the Lords, with the general objection of David Blair's being *passive* liable for the whole debts, and ordained the parties to give in informations upon that point only."

These informations contained the following argument :

Argument for  
the objecting  
creditors.

The heritable subjects, to which the claimant is entitled to succeed, are not all in the same situation ; part is in *hereditate jacente* of George Blair, and another in *hereditate* of William Blair the second brother.

With regard to the *hereditas* of George Blair ; the creditors maintain, that in no one particular have the requisitions of the act 1695. c. 24. been complied with ; for neither was the claimant entered heir *cum beneficio* to his brother George, nor was any proper inventory made out upon oath, of the subjects which belonged to George.

The inventory was said to contain the lands, &c. which belonged to the deceased William Blair of Beltenmont at the time of his death, &c. It contained lands which were said to have been in the possession of William Blair as apparent heir of the deceased Bryce, and George Blair's ; and it concludes, thus, " that the foregoing is a just and true inventory of the heritable means and estate, which belonged to the deceased William Blair of Beltenmont at the time of his death, either in his own right, or to which he might have succeeded as heir to the said deceased Bryce Blair his father, or George Blair his brother, as far as the said David Blair knows, or has hitherto discovered, &c." And the oath emitted by the claimant is precisely in the same terms.

But this is not an inventory of the heritage to which the claimant was entitled to succeed as heir to George, neither is it an inventory of the whole of George's estate ; or if it be found to include the whole, it is not an inventory upon oath as the act requires. The most essential regulation, therefore, of the act 1695, which appoints an inventory to be made upon oath, not having been complied with, in so far as it respects the *hereditas* of George, it follows, that the claimant is not entitled to plead the statutory privilege granted to an heir entered *cum beneficio*.

As to the subjects to which William had made up a title, the claimant is not at liberty to plead the statutory privilege, for this plain reason, that he never was entered heir at all. The words of this act are : " That for hereafter, any appearand heir shall have free liberty and access to enter to his predecessors, *cum beneficio inventarii*, or upon inventory, as use is in executries and moveables, allowing still to the appearand heir, year and day to deliberate, in which time he may

" make

“ make up the foresaid inventory,” &c. “ and the appearand  
 “ heir, entering by inventory in manner foresaid, is hereby  
 “ declared to be only liable to his predecessors debts and deeds,  
 “ *secundum vires inventarii*, &c.”

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This new and extraordinary privilege, is therefore confined to the heir, entering by inventory. The giving up the inventory is only a preparatory step towards entering heir *cum beneficio*; and if the heir does not expedite his service, he remains in a state of apparenacy, and subject to the ordinary rules of law.

It has been said by the claimant, that where an inventory has regularly been made up, the service may proceed at any distance of time; and a case from Fountainhall, 11th February 1708, Mackay v. Sinclair, was referred to, where this was found. But although that may be the case when things are entire, it never can be admitted where there has been a *gestio pro herede*; and here the claimant has been acting as heir for twelve years back.

The claimant rested his argument upon his having comprehended in the inventory every article of the estate, descending to him as heir of his father, or of his brother. That the inventory was regularly completed; for although it contains lands which were in the *hereditas* of George, who had been dead two years prior to the period at which the succession opened to the claimant; and consequently as he could not have served heir *cum beneficio* to George; yet as these lands had been in the possession of William during these two years, they were entered in the inventory under their proper description; and both the title and conclusion of the inventory bear, that it was made up in order to the claimant's being served heir to William, “ or others his predecessors, *cum beneficio inventarii*.” That after this inventory was completed, the trustees appointed by the claimant were proceeding to have made up his titles by service, when they were stopped by the creditors, who brought the lands to a judicial sale.

Argument for  
the Claimant.

When the cause came to be advised, the Dean of Faculty stated, That holding it to be clear law, that an heir who has completed an inventory in terms of the act of parliament may make up his titles by service at any time after the expiry of the year, he had not brought forward in the information the authorities upon which that opinion was founded. But as the point had been questioned by the objectors, he was now willing, if the Court thought it necessary, to state these authorities.

This was not thought necessary by the Court; and the cause being reported by the Lord Justice Clerk, their Lordships delivered the following opinions.

Lord

## CASE

I.

Opinions.

Lord *Esqgrove*.—I am clearly of opinion, that the intromissions which occurred here † would, in the common case, have been sufficient to infer the passive title of *gestio pro herede*. But here they have been made *sub modo*. The claimant gave a trust-deed for the purpose of having his titles made up; and there is clear evidence of the extent to which he meant to become liable. The directions of that deed were expressly to serve him heir *cum beneficio inventarii*. The inventory was accordingly made up, and it was legally and formally completed. There was no concealment, the creditors have no reason therefore to complain. I am clearly of opinion, that where an inventory is made up within the year in terms of the statute, the heir may serve after the year. But even allowing the time within which he must serve to be limited, it was not this claimant's fault that he was not served heir; it was entirely owing to the circumstance of the creditors having proceeded to adjudge, and to bring the estate to a judicial sale. The creditors have suffered no loss, there can, therefore, be no ground for subjecting the claimant to an universal passive title; and if so, there can be no ground for sustaining the objection to his claim.

Lord *Henderland*.—*Gestio pro herede* is penal; but there surely can be no ground for any penal consequences in this case.

Lord *President*.—Passive titles are no favourites with the Court; and therefore we can never think of stretching a point to extend them. The creditors have received no damage, and there is nothing to prevent the claimant from entering still.

Lord *Justice Clerk*.—This man's conduct has been fair and honest. On hearing of the situation of his affairs, he immediately granted a trust-right for the purpose of paying the creditors. He gave directions to his trustee to make up his titles *cum beneficio inventarii*, the inventories were made out and recorded within the time allowed by the act, and the claimant may still serve heir *cum beneficio inventarii*. Neither would there have been any thing in the objection that there were omissions; for even had this been the case, the subjects might still be added to the inventory.

Judgement.  
May 13, 1791.

“ Upon report of the Lord Justice Clerk, and having advised the informations for the parties, and writs produced;  
“ the Lords repel the general objection stated by the pursuers to the interest produced, and claimed upon in this pro-

† Besides the argument taken notice of in this case, the opposing creditors endeavoured to fix a passive title upon the claimant, in consequence of certain alleged intromissions, and certain acts of the trustees; and it is to this part of the argument that his Lordship alludes.

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“ cefs by the defender David Blair, of his having incurred a  
“ paffive title to his deceased father and brothers; and remit  
“ the cause to the Lord Ordinary to proceed accordingly.”

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For the Claimant, the Dean of Faculty, } Adv. W. Campbell, C. S. } Agents.  
Objecting creditors, Mr. Solicitor, } H. Corrie, C. S. }

Lord Justice Clerk, Ordinary.

Mitchelson Clerk.

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## S O C I E T Y.

ANDREW DALGLEIH and DAVID FLEMING, Merchants in  
Glasgow, Pursuers;

A G A I N S T

JOHN SORLEY, Merchant in Glasgow, Defender.

A bill accepted by the firm of a company, after the expiry of the term specified in the contract for the indurance of the co-partnery, but before any public notice is given of its dissolution, the individuals who compose the Company are liable in the debt.

JOHN SORLEY gave a letter to James White in the following terms: “ I hereby make offer of being concerned with  
“ you, and holding an equal share in a business of manufac-  
“ turing buttons and buckles, and such articles as you judge  
“ advantageous: and that for the space of one year from the  
“ 1st day of January next. And I become bound to advance  
“ L. 50 Sterling, for my holding one-half share in the said  
“ business: and I agree to your having the whole manage-  
“ ment of the business, and paying yourself for the same 12s.  
“ weekly; and on your request at the end of that period I  
“ shall give up my interest and share in the business, upon  
“ being secured in the payment of my stock and profits, and  
“ the debts contracted by the Company; also to make a rea-  
“ sonable allowance for the wear of utensils and bad debts;  
“ and such as may be deemed doubtful at the settlement. You  
“ shall be at liberty to article workmen in your own name:  
“ But the firm of the Company shall be James White and  
“ Com-

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Dec. 17, 1788.

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“ Company.” On the other part, James White wrote a letter to Mr. Sorley of the same date with the former, accepting of the offer, obliging himself, “ not to contract debts at any  
 “ one time during the period of the partnership in the Com-  
 “ pany’s name above L. 100 Sterling :” And he says, “ nor  
 “ shall I accept any bill in the Company’s firm, without pre-  
 “ viously asking and obtaining your consent.

Under these counter missives, the manufactory was commenced, Sorley resided at Glasgow, and took no charge of it. But White went to Cannonmills in the neighbourhood of Edinburgh, where he conducted the business, and took houses, and engaged workmen in his own name, and used on his sign, and in his transactions the firm of “ James White and Com-  
 “ pany.”

The year during which the co-partnery was to continue, expired on 31st December 1787 ; and on the 6th March 1790, an advertisement was put into the newspapers, giving notice, “ that John Sorley was no partner in the concern carried on  
 “ under the firm of James White and Company near Edin-  
 “ burgh.” However, on the 9th January preceding, White had accepted a bill for L. 30, drawn by the pursuers upon him under the Company firm. This bill was discounted with Mr. Robert Armour merchant in Glasgow, and the produce was given to White upon a letter signed by him with the Company firm, obliging the Company to retire the bill when it became due. The money was applied to White’s own purposes.

The bill being dishonoured when it became due, was taken up by the pursuers who were the drawers, and an action was raised by them against Mr. Sorley as a member of the concern, carried on under the firm of James White and Company. This action came before the magistrates of Glasgow, when the defence stated for the defender was in substance, that he was no partner of the concern on the 9th January, when the bill was granted. The judgement pronounced by the magistrates,  
 “ Found it admitted, that the defender and James White  
 “ agreed, by the missives recited in the answers, to carry on bu-  
 “ siness in partnership under the firm of James White and  
 “ Company, for the space of one year from 1st January 1789,  
 “ of which company James White was appointed manager ;  
 “ and as such was authorised to sign the Company firm, and  
 “ that the business was carried on accordingly. They also  
 “ found, that although the said bill and missive were granted  
 “ on the 9th January 1790 ; yet as the defender before that  
 “ date had made no intimation in any newspaper, nor other-  
 “ ways intimated to the public, nor to the partners that he  
 “ ceased to continue in said partnership on the expiry of  
 “ the year ; and has not alleged, nor offered to prove that the  
 “ pursuers were in the knowledge of the said partnership being  
 “ dis-

“ dissolved at the time the bill and missive were granted; nor  
 “ that they were in the private knowledge that the money raised by the said bill, was for any other purpose than the use  
 “ of the Company. They found the defender liable for the  
 “ debt libelled.”

CASE

I.

By a subsequent judgement, the magistrates allowed the defender to prove, that the pursuers were acquainted with the dissolution of the Company, or the circumstance of the defender's having withdrawn from it; but adhered in other respects. The cause was then brought before the Court of Session by advocacy, when Lord Dreghorn, as Ordinary, remitted the cause *simpliciter* to the magistrates; and found the defender liable in expences. Feb. 26, 1791.

The cause was then brought before the Inner House by a petition for the defender. He contended, that upon the expiry of the year the co-partnery was at an end, and that he could no longer be considered as a partner, it was the same thing as if he never had entered into the agreement; that the principle of law is, that “ *unusquisque scire debet conditionem ejus cum quo contrahit* ;” and had the pursuers made those enquiries which it was incumbent upon them to have made, they would have discovered that the defender was not a partner; if they neglected to make the necessary enquiries, they must be liable for the consequences. It was upon this principle that the decision was pronounced in the case of Armour v. Dr. John Gibson. Falc. Col. November 29, 1774.

With regard to the practice of advertising the dissolution of concerns, which was said by the pursuer to be a necessary form, it seems to have arisen from the necessity of warning those indebted to a company to pay up their debts. It has no law in its favour; it is supported by no practice; it is not yet fifteen years since such advertisements first appeared; they never were general, nor even frequent: The first commercial houses in this city, the banking-house of Sir William Forbes and Company have suffered changes in their partners, without any intimation ever having been made; and the one half of the dissolutions that happen, are not made public. There is therefore neither law, nor practice, nor form, by which this intimation is to be made. In what newspaper is it to be inserted? how often is it to be repeated? in what form is it to be made? from what time does it give protection? No answer can be made to these questions; and in this state of uncertainty, the Court will not make an intimation the guide and rule of its decision.

Lord Rockville.—There is a very material circumstance which appears from the letters that passed betwixt the partners; Whyte was thereby bound not to grant a bill under the firm of the Company, without having obtained the consent of  
 3 R. his

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his partner Mr. Sorley. If the pursuers ever saw these letters, it was their duty to have informed the defender of the nature of the transaction before they engaged in it.

Lord *President*.—After the solemn decision in the case of Gibson, in the 1774, I cannot go back to this private agreement of partners appearing only in the contract of co-partnery; for it was there solemnly found, that when persons act as a company, third parties who transact with them have no concern with the private pactions of the partners. It is said here that the co-partnery was at an end: but this was by no means the case; the contract was to endure for a year certain; but it was to be at an end then, only in the event of Whyte's requiring Sorley to give up his share; and no advantage was taken of this condition, nor had steps been thought of for dissolving the company when this bill was granted. If it had been intended to dissolve the company, proper intimation of this dissolution ought to have been made to the public. It is true, there is no precise form in which this must be done; but certainly an intimation of one kind or another was necessary.

Lord *Esqgrove*.—I never understood that it admitted of a doubt, that parties treating with the partners of a company, are not affected by the private stipulations of the partners. It is adverse to justice, that these private stipulations should have so material an influence as that which is contended for by the defender. Besides, it is a frequent practice with partners to continue the concern, after the time fixed in the contract, by a kind of tacit relocation: and from the terms of the agreement in this case, it was not precisely fixed at what time the co-partnery should dissolve; there was a condition on which its duration was to depend: so that even had the agreement betwixt the parties been made public, it could not have been known with certainty that the connection was to continue only for a year. As to the form of advertising, the defender has taken a very proper one; though unfortunately for him, not until a month after the bill in question had been granted.

State of the vote, See, or Refuse the petition.

See, Monboddo, Hailes, Henderland, Dunfinnan.

Refuse, Justice Clerk, Alva, Eskgrove, Swinton, Rockville, Ankerville.

The Lords refused the prayer of the petition.

For the petitioner, Ar. Fletcher, Advocate.

Mr. Montgomery, Agent.

Lord Dreghorn, Ordinary.

Menzies Clerk.

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S U C.

## S U C C E S S I O N.

Mrs. REBECCA HOGG, eldest Daughter of the late ROGER HOGG, Esq; of Newliston; and THOMAS LASHLY, Esq; her Spouse, for his interest;

A G A I N S T

THOMAS HOGG, Esq; of Newliston.

When a native of this country, domiciled here, and possessed of property situated in England, executes a settlement conveying that property; the settlement has not the effect of defeating the claim of *legitim*.

THE late Mr. Hogg was a Scotsman by birth; he was bred a merchant, and went to London early in life. In the 1737, he married Miss Rachel Missling, with whom he received L. 3500 Sterling; and having become a partner in a banking house in London, he made a very considerable fortune. In the 1757 Mr. Hogg purchased the estate of Newliston, in West Lothian, and there he fixed his constant residence. Mrs. Hogg died at Newliston in the 1760, leaving six children of the marriage, some of whom had settled in London, and all of them except Mrs. Lashly, the pursuer, had received suitable provisions, at the time of their marriages. Mrs. Lashly having married without the consent of her father, received no provision. But Mr. Hogg advanced to Mr. Lashly L. 700 upon his bond, and gave his daughter from the 1772, an annual allowance of L. 62, equal to the interest of the balance of her portion.

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In March 1789 Mr. Hogg died at Newliston, where he had constantly resided from the 1757, leaving, besides the estate of Newliston, those of Kelly, of Luscar, and of Clune, in Fife, besides executry. Mr. Hogg had also money in the hands of his London banker, and he was possessed of property to a considerable amount, both in the British and French funds.

Mr. Hogg had executed a general disposition, containing a nomination of executors, in favour of his eldest son, Mr.

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Thomas

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Thomas Hogg, burdened with provisions to his younger children, and with legacies. The provisions in favours of Mrs. Lashly, were given under condition that they should be received in full of all portion-natural, *legitim*, bairns-part of gear, or other demand. But Mr. and Mrs. Lashly rather chose to betake themselves to their legal claim of *legitim*, which, according to their plea, extended over the one half of Mr. Hogg's moveable estate, wherever situated. In this action, the Lord Ordinary had found, that the succession was to be regulated by the law of the *domicile*, and consequently that there was no distinction to be made betwixt the English and Scots effects. But when the question came before the Court, upon a petition and answers, their Lordships "found that the pursuer's claim of *legitim*, can in no degree affect the moveables not situated in Scotland, at the time of her father's death; and in so far sustain the defences, and assoilzie the defender."

Dec. 2, 1790.

Upon pronouncing this judgement, the following opinions were delivered.

Opinions.

Lord *Justice Clerk*.—The Lord Ordinary has found that there is no distinction to be made, betwixt the Scots and English effects; this is an opinion in which I cannot acquiesce. It is a *questio potestatis*, and the state of the two subjects is exceedingly different. The Scots funds cannot be conveyed by testament, so as to defeat the claim of *legitim*; the English may. If then the will of the testator be explicit, the question must depend upon his power, and the conveyance can be reduced only in so far as his power is deficient, and his power is deficient in respect to the Scots funds only; for, is it possible to say, that he had no power over the English funds, when, by the law of that country, he was entitled to bequeath them at pleasure.

Lord *Henderland*.—I am clearly of the same opinion. In England, it was a matter of great doubt, by what rule intestate succession was to be regulated, until Lord Hardwick's time. When there is no express will, we must take the presumed will of the deceased, and that we must suppose to be in conformity with the law of the *domicile*, with the rules of which law he was acquainted. This depends not upon the law of a particular state; it is part of the law of nations. Of this law another great rule is, that *pacta sunt servanda*: this is in unison with every principle of expediency and justice; in all cases regard ought to be paid to the will of the party. The question therefore is, whether our law of *legitim* be a branch of public law which ought to be extended to countries where it is unknown? *Extra territorium impune non paretur*. Our law is limited to our own country, and I see no ground for extending its influence to effects in England. This is not a case of interstate

state succession, where we are forced to take the presumed will of the testator ; it is a case of declared will, and that expressly excludes the law of *legitim* ; not with respect to subjects situated in this country, 'tis true, but surely as to all subjects out of Scotland. I know of no *comitas* which can extend our law on this head to foreign countries.

Lord *Dreghorn*.—My difficulty is, that Hogg has expressed his will ; and with regard to the effects in England, -he has declared that they shall not fall under the law of *legitim*. How then can we take the presumed will, founded on the law of the *domicile*, and make it over-rule the express will of the deceased?

Lord *Esqgrove*.—Supposing the *lex domicilii* to regulate intestate succession. I doubt whether it could be applied to the present case. *Legitim* does not seem to stand in the same situation with intestate succession, which rests on presumed will. *Legitim* gives a *jus crediti*, and is not founded on presumed intention : for then it might be defeated by express will ; but it cannot. *Legitim* vests *a morte patris*, and does not require confirmation to carry it to the child, as in the case of common succession. It is a law which flows from our ancient municipal customs. Now, although presumed will may have the effect of regulating the succession of effects situated in a foreign country, and be a ground for preferring the pursuer, upon the supposition that he was the person to whom the deceased meant to give the subjects. Yet I am not clear, that the same favour ought to be shown to the pursuer, when he appears there claiming as a creditor, in consequence of a peculiar law of this country, which cannot have any effect beyond our territory. Had the law of *legitim* been known in England, I should have been of a different opinion. We have, in the case before us, a written will, and whatever by the law of this, or of any other country, falls under it, must be carried by it. Supposing, that in England, the King were to have right to a certain share of the moveable succession, then this deed, when pursued on in England, would be burdened with the share falling to his Majesty, whatever might be the law of Scotland. Now, as by the law of England, there is no law of *legitim*, that law must regulate the question, when the parties claim the effects there, upon the express will of the deceased. I shall illustrate this farther by the case of a testament made in this country, bequeathing landed property lying here, as well as landed property situated in England. The testament could have no force to convey the estates in Scotland ; because, by our law, they cannot be conveyed by a testament ; but when the deed came to receive effect in England, this peculiarity in our law, would not be allowed to cut down the conveyance of the English estate. I therefore hold it, that  
where

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where there is a settlement containing the declared will of the testator, that will must receive effect according to the law of the country in which the subjects are situated.

Lord *President*.—This is not a case of intestate succession; there is a settlement, and it is to it we must have recourse. When the testator has not declared his will by any deed, we must regulate the succession by some law; and the opinion of lawyers has been, that it should be regulated by the *lex domicilii*. It is presumed that the testator meant to have collected his whole property to the place where he has taken up his residence, with an intention to reside during the remainder of his life; and, and by the law of that place, is the succession to the property regulated. But when a person expresses his intention by a will, there can be no occasion to resort to presumption. Mr. Hogg has expressed his intention, and I am of opinion that it is by that intention that the English effects must be distributed.

It was upon these opinions that the judgement was pronounced, which has been already recited; and, upon advising a reclaiming petition, and answers, the point was thought of sufficient importance to merit a solemn decision upon a hearing in presence. A hearing was accordingly ordered; and the cause was pleaded, on the part of the pursuer, by Mr. John Clerk, and Mr. Solicitor General; and, on the part of the defender, by Mr. George Fergusson, and the Dean of Faculty.

Argument and  
authorities for  
the pursuer.

The question, whether the *lex domicilii*, or the *lex rei sitæ*, ought to regulate the succession of moveables in a foreign country is part of the *jus gentium*. By this law, a nation is considered as an individual, and its duties to other nations as individuals, and its conduct towards them, are pointed out and directed. It is, in this respect, on the footing of a system of morality, that every nation is left to judge in its own cause, as an individual is in those cases where there is no civil obligation; there is, however, in every well governed state, a tribunal before which even the nation itself is content to appear, and which is bound to do justice betwixt the nation and all others.

As the laws of one state are different from those of another, it must often be a question whether the law of the one country, or that of the other, ought to be the prevailing rule with regard to a particular subject; and therefore, it is highly necessary that neighbouring jurisdictions should fix their boundaries upon equal and rational principles, so as to produce the greatest good and the least inconveniency to each community. To fix these boundaries belongs to the law of nations; by that law they must be fixed, or by the sword.

But it is here proper to observe, that the law of nations can go no farther than to decide, whether the laws of the one country

try or that of the other must be applied ; this being decided, the case becomes strictly a question of municipal law.

By this view of the law of nations, the pursuer apprehends that some of the difficulties attending this case are removed. Thus, it has been said, that a will is *juris gentium*, and must be protected all the world over. But if the province of the *jus gentium* be merely to decide upon controversies between one state and another, and to determine whether the law of one country or of another should prevail, it follows, that a will made in one country may not be supported in another. The difficulty has arisen from a very erroneous, though a very common way of speaking, with respect to the *jus gentium*. Grotius, l. 2. c. 8.

It deserves particular attention, that though the question as to Mr. Hogg's succession must depend ultimately upon the law of nations, that law has not been founded upon by the defender ; he has even denied that it has any thing to do with the case : Yet it is certain that Mr. Hogg's will, being executed in the Scots form, and defective in certain formalities required by the law of England, would of course be set aside by that law, unless supported, from the respect paid to our law by the *jus gentium*. Strange as this neglect may seem, the reason is very obvious ; for were the question avowed to rest upon the law of nations, it is lost ; and this brings the pursuers to state those general principles upon which the *lex domicilii* is found to be the rule.

In cases of succession, a distinction has been universally adopted betwixt moveables and land rights. The succession to the latter, in every country of modern Europe, is regulated by the law of the state within which the property is situated, the reason of which is foreign to the subject of the present enquiry, as it is agreed on all hands, that the rule does not apply to the succession of moveables.

The writers on the law of nations admit, that the property of individuals is the property of the state ; and it follows, that the goods of individuals, by passing into a foreign country, still belong to that state of which the individuals are members ; and although they be locally situated in a foreign state, that state has no right over them, M. de Vattel. liv. 2. c. 8. § 109 ; and they are equally safe, both to the individuals, and to their country as if they were locally situated within it.

Hence those maxims, *mobilia non habent situm, et mobilia sequuntur personam*, the plain meaning of which is, that nations will not consider the local situation of moveables belonging to a stranger, but will dispose of them, in the same manner, as if they were with him in his own country. And in this argument, the pursuers, when they talk of country, have the authority of every writer on the civil law, and on the *jus gentium*,  
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to apply it to the country of the *domicile*. Puffendorf. de Offic. Civ. c. 18. § 15.

It therefore appears, that there are the strongest reasons, in justice and policy, that the law of the *domicile* should be the rule in all questions respecting the succession of moveable properties; and here it may be proper to observe, that there are several considerations which establish this, even were other questions relating to moveables, to be regulated by the *lex loci rei sitæ*.

The law of succession, has, every where, and in all ages, been a matter of high consequence; in many states it has been a principal of government, and as such, carefully preserved: even with us at this day the *legitim* is a branch of the public law, enacted for the safety of the state, whose interest it is to preserve younger children from indigence: strange then, that this law should be capable of being frustrated upon no better pretence, than the local situation of moveable property.

There is another circumstance. A man may have moveable property, in a variety of different places, governed by as many different laws; if these effects are to be distributed according to those different laws, there is no man can know what is to become of his succession, with regard to the moveables not in his own country: Even if he makes a will, he cannot know what is to be its effect; and thus, if the *lex rei sitæ* is to be followed, the most anxious foresight cannot avoid those difficulties which must attend the distribution of property situated in different countries. But this is not all; for property may be removed into another country, without the knowledge of the proprietor.

Further, without entering at present into the question about the *situs* of *nomina*, let it be supposed that the *situs* of a debt, is at the debtor's *domicile*; as the debtor may change the place of his residence, it is evident that no man can either direct his own succession as to *nomina*, or even know what is to become of it.

Although in common questions of law, there is no true argument but that which is to be drawn from authorities, yet, in a question of so general a nature as the present, it is necessary to go to those principles of justice, utility, or policy, which are antecedent to all law; and upon such principles all writers, who have treated of the *jus gentium*, are upon their side of the question.

Vattel gives us an opinion, directly in point, B. II. c. 8. § 110. \* To take off the weight of this authority, it has been

\* In attempting to abridge the very learned and ingenious pleadings in this cause, it is impossible to do more than to give the quotations, and to endeavour to connect  
not

been said that the distinction betwixt *loix locales*, and *loix qui affectent la qualite de citoyen*, is obscure; but it is explained in the next section (111.) that by the former is meant, laws which fix the rights of things without relation to persons; and by the latter, those laws which fix the rights of persons.

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Another objection is, that according to Vattel, it is not the *lex domicilii* but the *lex originis*, which must regulate a man's succession. But the author, (L. I. c. 19. § 213, and § 219,) considers a domiciled stranger as a member of the state; and, in treating of matters of succession, he comprehends the members of the state without distinction: See also L. II. c. 8. § 96, at the beginning.

This objection is favourable to the pursuer's plea in another point of view. A *domicile* must be proved by facts and circumstances; partly by what a man has done, partly by what he means to do, L. 7. Cod. de inc. Hence a number of presumptions in the civil law, and in the laws of modern nations. Every where, however, and particularly in Scotland, the question of *domicile* is in a great measure *facti*. We have a rule for ascertaining a *domicile*, but only to the effect of regulating the jurisdiction of judge-ordinaries, Erskine, B. I. tit. 2. § 6. It by no means ascertains what a *domicile* is, in a larger sense, in which a whole kingdom may be said to be the place of a man's *domicile*.

A *domicile* being fixed by *presumptiones hominis*, a strong presumption arises in favour of the native country, as it is natural to suppose, that a man would prefer it to any other; so strong is this presumption, that a man may remain a long time out of his native country without losing his *domicile*; and it might thus be maintained, that Mr. Hogg, at no time had lost his *domicile* in Scotland, and if the pursuers have not mistaken the act 1426, c. 88, it would lead to the same conclusion. In our law, in short, the *locus originis* has been reckoned a circumstance of the greatest importance, in questions of succession; and whenever the *lex originis* applies in cases of succession the origin of the deceased is considered, and never that of his heirs.

But to return to the general question: Grotius and Puffendorf, neither decide the present case, nor do they give their opinion upon the general question, by what law disputes concerning foreign moveables are to be regulated; but they both agree, that the property of a subject, shall be answerable for the debts of the state to which he belongs (Grotius, L. III. c. 2. sum. n. 2.—Puffendorff, (in the translation of Barbeyrac,) L. 8. c. 6. § 13.—Burlamaqui, Tom. II. part 4. c. 7.) as this is the

next them in such a manner as to enable the reader, by consulting the authorities, to view them in nearly the same light in which they are presented in the papers.

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very principle of Vattel, that the property of the members of a nation, is the property of the nation, the conclusion must be the same.

Puffendorff, (Barbeyrac's translation) L. 8. c. 5. § 3. Grotius, L. II. c. 5. § 23.—Burlamaqui, Vol. II. p. 20, lay it down, that the right which a state has over the goods of individuals is a right of property, so far as public utility requires, tho' they make no distinction betwixt the goods within, and those without the territory; another writer goes farther, and lays down the same doctrine with Vattel, with this difference only, that in place of speaking of the state, he speaks of the Sovereign as its representative, Senec. de Benefic. L. 7. c. 4. 5.

To suppose that these writers would, in the succession of moveables, declare for the *lex loci rei sitæ*, would be attended with two incongruities: 1. It would be contrary to the independence of sovereign states, that the property of one state, should be subject to the laws of another. 2. Restraints on the faculty of testing, are, in the words of Puffendorff, intended for the preservation and advantage of the state; but if the *lex rei sitæ* be the rule, it could have no such beneficial effect.

The pursuers come now to the opinions of the civilians. Though there is no text in the *Corpus Juris* which applies to the case, yet most of the commentators have delivered their opinions upon it by way of inference from the principles in the text. Heineccius is silent upon it, but Voet, Vinnius, the two Hubers Ulric and Zachary, Zoësius, Pickens, Eujacius, and Rodenburgh, are clearly of opinion, that the *lex domicilii* is the rule in moveable succession. Their argument lies within a very narrow compass: on the one side it is said, *statuta non valent extra territorium*, and *extra territorium jus dicenti impune non paretur*; on the other side, it is urged, *mobilia non habent situm sed sequuntur personam, et in ejus domicilii loco esse habentur*; and if this be not the fact, it is held to be so by a fiction; and if the *fiction* is not admitted *de jure*, it is supported *ex comitate*.

Ulric Huber rests the doctrine upon expediency, and the mutual good of nations, Pars 2. l. 1. t. 3. § 2. 3. 5. 9. 10. 12. 13. and 14. From these sections, it is clearly the opinion of this author, that wherever a testament is prohibited, either in whole or in part, by the law of the testator's *domicile*, the prohibition extends to his effects wherever situated; and in section 15, he lays it down, that succession *ab intestato* in moveables, is regulated by the *lex domicilii*, for which he quotes Sandeus, Lib. IV. Decis. tit. 8. def. 7. Rodenburgius, *De jure, quod oritur ex statutorum vel consuetudinum discrepantium conflictu*, and in particular, c. 2. tit. 1. in fin. and tit. 2.

It may perhaps appear singular, that Huber, amongst other instances of restriction upon the faculty of testing, should not have mentioned that upon a father as to the *legitima pars*. But this

this is by no means unaccountable, for by the laws of every country, with which he was acquainted, the *legitima pars* was due. Besides, he considered the *legitim* as *juris natura et gentium* Pars Lib. II. tit. 18. § 10, and Vinnius is of the same opinion, Ad Instit. L. II. tit. 18. § 3. n. 3. Huber, in his work, *De jure civitatis*, though referred to by the defender, is equally explicit and equally favourable for the pursuers, as elsewhere, L. III. sect. 4. c. 1. § 23.—L. II. sect. 6. c. 6. § 28. § 20. 21. sect. 4, c. 2. § 2. 3. 4.

Voet, who, in Scotland is of the first authority, is clearly for the *lex domicilii* in the succession of moveables, both testate and intestate, Lib. I. tit. 4. p. 2. § 12. Lib. XXXVIII. tit. 17. § 34. Lib. V. tit. 2. § 47. Lib. XXVIII. tit. 3. § 12. The authorities referred to by Voet leave no room to doubt, that the *lex domicilii* is followed by the civilians.

With these opinions, the practice of every modern nation in Europe, so far as the pursuers know, corresponds. Denifart, in his *Collection, De jurisprudence, voce domicile*, § 3. 4. Argentræus Com. in Duc. Britanniaë, act. 218. p. 609. Cujacius, Tom. 1. 373. c.

The law of England is established on the same principles, Burn v. Cole, Privy Council, 1st April, 1762.—Pipon v. Pipon decided in Chan. Trin. 1744.—Vizey's Reports, Vol. II. p. 35. Thorne v. Watkins. In this case, there is a very full opinion given by Lord Hardwicke. The defenders acknowledge, that the opinion of Lord Hardwicke is high authority; but they say that this opinion is incidental only; that the debt was English, being due by an English debtor to an English creditor, and that therefore the *rei situs*, as well as the *domicile* was in England. But this seems to be a mistake; the subject in dispute, was the estate of Richard Watkins, which was to be recovered in Scotland, and of which his nephew had been entitled to a share. At the time when this nephew died, the estate still remained unrecovered in Scotland, as appears from the speech of the Lord Chancellor, and it was that circumstance alone that could have given rise to the question: the case is therefore directly in point.

Some years before this decision was pronounced, Sir Dudley Ryder, had been consulted in Lord Banff's case, and had given that erroneous opinion, which had the effect of misleading this Court. This opinion has been resorted to by the defenders; but the opinion of a lawyer is not to be set in opposition to a series of decisions, and had Sir Dudley been consulted three years later, he would have given a very different opinion.

The pursuers have not been able to discover any case, from that of Thorne v. Watkins, till the case Kilpatrick v. Kilpatrick, in the 1787. Archibald Fleming, a Scotsman, resid-

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ing in Scotland, had right to L. 300, of a legacy left him by Kilpatrick. This legacy was due from the effects of Kilpatrick situated in England, and might have been disposed of by testament, had Fleming lived in England. Fleming died in the 1783, leaving a widow, by whom he had no children, and a grandson by a former marriage. The widow put in her claim to one half of the L. 300 due in England, as hers *jure relictae*: The case came into Chancery, and was decided in her favour by Lord Kenyon, upon an opinion given by the Lord Advocate (Hay Campbell, Esq;) stating what was the law of Scotland upon the point.

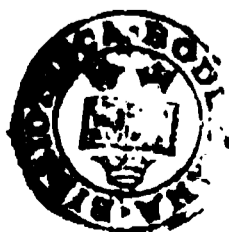
The defenders object to this case; 1. That the suit was an amicable one; but this was by no means the case. 2. That the decision proceeded upon an opinion on the right of a widow in the estate of her husband, by the law of Scotland; whereas, if the opinion had born, that the restraint upon the husband's power of testing, extended only to effects within Scotland, the decree would have been just the reverse. This is recurring to an idea, which the pursuers hope they have obviated. Lord Kenyon did not want to know whether the *lex domicilii*, or the *lex rei sitæ*, was followed in Scotland, as to moveable succession; but only what was the proper municipal law of that kingdom; he was aware that the other did not belong to the civil law of any country: But to the law of nations, and of this, he certainly would consider himself able to judge.

Thus there are four judgements of the English courts, and with the assistance of English counsel, more would have been produced. From the authority of Lord Hardwicke, it appears, that the constant practice and understanding of England, has been agreeable to the principle of these decisions.

Amongst other arguments for the *lex domicilii*, Lord Hardwicke states his apprehensions that the *credit* of the funds might be affected by a different rule. But this argument the defenders endeavour to turn the other way, and insist that foreigners, who are restrained by the law of the *domicile*, must, in order to acquire freedom, go somewhere else with their money. This reasoning comes too late, as the law of England is already fixed, and cannot be altered but by an act of the legislature. Besides, there is no reason to believe, that the *credit* of the funds is hurt, by following the rule of the *lex domicilii*; and at any rate there is no country in Europe, except England, where moveable property, is not more strictly fettered, than in Scotland.

Hitherto the pursuers have treated the subject without entering into the doctrine of succession, or explaining the nature of the right of *legitim*. The *legitim* is every where equivalent to a right of property, *pro ære alieno reputatur*, and it is a right

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so much favoured that *causa liberorum in plerisque causis pia causa prefertur*. Can it be doubted, then, that these favoured creditors, would be entitled to payment, wherever the property be situated? The nature of this right, by the law of Scotland, shall be explained, that the cause may be taken in at one view.

The right of *testamenti factio* is unknown among uncivilized nations. Plutarch tells us that it was introduced among the Athenians by Solon, under an exception of those who had children. The Romans were equally unacquainted with the right of testing, till it was adopted by the Decemvirs, by the law of the twelve tables; and the same exception took place, by the *querela inofficiosi testamenti*. Testaments were also prohibited, by our ancestors the Germans, Tacitus, De Morib. Ger. c. 20. and the modern nations of Europe followed the same rule.

It may appear singular, that a rule, which by the defenders is said to follow from the nature of property, and is even referred to the law of nature, should have been so universally disregarded. The truth is, that in those early ages, the father was not considered as the exclusive proprietor, but only as the chief member of a society, having goods in common. Hence Bynkershoek, gives the reason for supporting a will, by a father to his children, though destitute of legal solemnities, because children were to be considered as proprietors and possessors of the subject, Obser. Jur. Rom. l. 2. c. 2. To the same purpose many authorities might be given, the pursuers, shall refer only to that of Lord Kaimes, who considers the right of children, to have been originally not so much a right of succession, as a continuation of possession, founded upon their own title of property, Law Tracts, tract 3. And this is not only the state of succession in every rude nation, but seems to be the most agreeable to justice. The whole family contribute to the common safety and comfort; and it is contrary to reason and justice that the father should alienate the whole to strangers.

In early times then, the rights of children, like those of other proprietors, would prevail against the will of the father; and such, it cannot be denied, was once the law of this country. It follows then, that the right of *testamenti factio*, wherever it has been established, is an invasion of the right of property belonging to children; accordingly, in questions of power where the testament is either against the widow or children, the favour lies on their side †.

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† The defender argues, that a right of property includes a right to alienate *inter vivos*: that a right to alienate includes a right to make a testament; and consequently, that succession *ab intestato* is governed by the presumed will of the deceased. This argument is combated in this part of the pursuer's pleading; and

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This right of *legitim*, then, is not founded on the presumed will of the deceased; on the contrary, it was originally a right of property, and it still retains strong marks of its original nature. “Children, by the law of Scotland,” says Lord Kaimes, “enjoy another privilege, which is a certain portion of the father’s moveable estate. Of this he cannot deprive them by will, nor by any deed which does not bind himself. This privilege, like that of death-bed is obviously a branch of the original law being founded on the nature of property, as originally limited.” And this law of death-bed is explained in the same tract from which this quotation is taken (tract 3.)

This right assumes its native appearance the moment that the father is seized with that disease of which he dies. The *legitim* vests in the children *ipso jure*, and without confirmation, a circumstance in which it is essentially different from any other right of succession. Ersk. B. III. tit. 9. § 16. where the right is drawn from the communion of goods consequent on marriage.

The same doctrine is laid down by Lord Stair, B. III. tit. 8. § 44. with this difference, that the right is referred to the natural obligation upon parents. It is true, this author considers the first rule of succession to be the express will of the owner; yet this is under an exception of the *legitim*, which he holds as equivalent to a *jus crediti*.

Dirleton (voce *Legitimæ Liberatorum*) derives the *legitim* immediately from the communion of goods, and puts the wife and children exactly upon the same footing. Stewart, in his Commentary upon this passage, denies that the communion of goods extends to children, and ascribes the right of *legitim* to their natural right of succession, which is called *legitim* “quod pater testamento aut legatis minuere non potest.”

Thus it appears, that the *legitim* is derived from that common right, which in every early stage of society is held by children in the goods of the family, and in consequence of which they do not so much succeed as heirs, as continue the possession and right of property which they had before the death of their father: that in the progress of civilization, altho’ the power of the father is increased, while that of the children is diminished, still the right of the children is not entirely extinguished; on the contrary, in the opinion of our most celebrated writers, the *legitim*, in its present state, is the remains of that right of property which formerly extended over the whole goods of the deceased. And those who are least favourable to it admit, that it is a provision due by the law of nature from pa-

it is shown, 1. That succession, where a person has not the right of *testamenti factio*, is not founded on presumed will. 2. That in questions whether the law of one place, or that of another, shall be the rule in succession, the presumption does not regard the will of the deceased, respecting the distribution, but his will respecting the situation of his effects.

rents to children, so fixed as not to admit of diminution, and not different from any other debt.

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Whichever principle be taken, the conclusion will be the same. If the *legitim* be a right of property, it extended originally over the whole property wherever situated, and still must extend over one-third of the moveable property wherever situated. It is a property, which though dormant during the life of another, yet at the death of that person, vests the effects, as completely as any other medium of acquisition whatever.

On the other hand, supposing the *legitim* to be only a *jus crediti*, the same argument will apply; for as there was a time when there was no right of *testamenti factio*, so when it was permitted as to the dead's part, the *omnes mobiles* of the law, (Reg. Maj. Lib. II. c. 37,) would mean the whole property, wherever situated, so that with regard to the *legitim*, there never could be any permission to test, whether we call the goods in communion, the property of the deceased or not.

Further, it may be observed, that an additional consideration arises from the nature of the mother's right in the goods in communion. Her's is a right of property upon which she can test, extending to a third, where there are children, and to a half, where there are none. It has been said, however, that her right extends in every case, to a half; and where there are children, a proportion of her share is deduced in order to make up their *legitim*, so that when the husband dies first, and the tripartite division takes place, it resolves into an equal contribution from the husband's share and that of the wife's to make a third share for the children: the same happens when the wife dies first, the share of the *legitim*, arising from her part of the goods in communion, is left under the administration of the father, Bankton, B. III. tit. 8. § 33. If this be a just account of the matter, it follows, that when the wife dies first, the right of property which was in her, vests in her children; so as to give them a communion of goods with the father, still leaving him the right of administration.

From this deduction of the claim of *legitim*, and the explanation of it as now understood in Scotland, the general question is superceded, and the *legitim* must be considered as a burden upon the succession of Mr. Hogg, and as such it must receive effect in every country, where there is justice enough, to make an onerous claim be regarded.

The general question, What is the rule by the law of Scotland in the succession of moveables, when the testator's *domicile* and effects are in different countries, must be determined, as above, by the authority of the law of nations, &c. or by the statutes or customs of this kingdom; and it will be found, that upon this point the law of Scotland is abundantly plain.

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As a *domicile* is *facti*, the principal circumstance is the native country of the party whose *domicile* is to be ascertained; and the presumption in favour of the native country is so strong, that by the civil law, and that of most modern nations, it requires in some cases a residence of many years, to form a *domicile* in a foreign country. In early times, the presumption, must have been still stronger; when a stranger and an enemy were synonymous, the *lex originis* and the *lex domicilii* were always one and the same law; and both of them equally opposite to the *lex rei situs*; and hence every authority in our law for the *lex originis* is an authority for the *lex domicilii*.

Keeping this in view, it appears, that the *lex domicilii* must have been followed at a very early period. In the statutes of Will. there is a chapter (c. 34.) *De hospitio, et testamento peregrinorum*, by which it is plain, that their succession was not regulated by the laws of the kingdom; on the other hand, there is an extreme anxiety that no other than the laws of Scotland should be followed by the lieges, 1425. c. 48, and the act 1503. c. 79, is nearly in the same terms; and it is remarkable, in the terms of these acts, that they do not declare that the law of the kingdom shall be used within the realm, but that the lieges shall be regulated by them.

The act 1426, c. 88. is another legislative enactment in favour of the *lex domicilii* in cases of succession. Another act seems to throw further light upon the meaning of the legislature, 1503, c. 81. It is entitled, “That ne merchands persue ane uther in partes bezond sea, before any judge bot the conservatour.” And Sir George M’Kenzie informs us, in his Observations, that in his time this statute was in full observance. It is the next but one to the act formerly mentioned, 1503, c. 79, which declares, that our sovereign lord’s leiges shall be governed by the laws of the realm, and be none other lawes; so that the two acts, taken together, were plainly intended to establish an uniformity of laws among Scotsmen, wherever their persons or goods might be; and by the act 1426, this uniformity was to take place in matters of succession, as well as in transactions *inter vivos*.

To come now to the opinions of our writers of the greatest authority. Craig, (*Jus Feudale*, lib. 2. dieg. 17. § 8, 10.) lays it down as an exception to the general rule of succession, that the succession to a feu is to be regulated by the *lex rei sita*, and not by the *lex domicilii*. Dirleton has started the general question, under four different heads, *Mobilia—Process against Strangers—Strangers—and Testaments*, and he evidently gives the preference to the *lex domicilii*, and Sir James Stewart in his Answers, is more decidedly of that opinion.

Lord Stair (B. I. tit. 1. § 16.) has been quoted on the other side, but his opinion must have a very different tendency, when it

it is observed, that it is the rights of Scotsmen only of which he speaks, which may be referred to the *lex originis*, and that again, as has been formerly observed, is little different from the *lex domicilii*.

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Lord Bankton is apparently against the pursuers, though perhaps it may be found, that his opinion rests on the same grounds, and may be explained the same way with Lord Stair; or perhaps he may have been influenced by the opinion of Sir Dudley Ryder, as he published in the 1752.

Mr. Erskine is an authority decidedly for the pursuers, B. III. tit. 9. § 4. And Lord Kaimes, B. III. c. 8. § 3, suggests a case in point, and gives an opinion for the pursuers\*.

The defender, in treating this question, shall, I. Submit some considerations on the nature of succession: II. He shall enquire, what is the law of Scotland upon the point in question: And, III. He shall offer what occurs respecting the law of England, and the authorities that have been quoted from it by the pursuers.

Argument for  
the defender.

I. The right of succession is a consequence of the right of property. The power of alienation being naturally inherent in every right of property, the proprietor may alienate his property *inter vivos*, or dispose of it by a testamentary deed, Grotius, de jur. l. 2. c. 6. § 14.—Stair, B. III. tit. 4, § 2. Testamentary succession, or succession by the deed or will of the proprietor, is therefore the most natural species of succession; and legal succession can be no more than subsidiary to it: Accordingly, legal succession has been held by the best writers on the law of nature, and on our law, to be founded on the *presumpta voluntas* of the deceased proprietor, Grotius, l. 2. c. 7. § 3.—Puffendorff, l. 4. c. 11. § 1.—Stair, B. III. tit. 4. § 3; and Lord Stair, through his whole title of Succession, considers succession *ab intestato*, as chiefly founded upon the presumed, or conjectured will of the deceased.

It has been said, that presumed will cannot be the rule, because it takes place in the case of infants and idiots who could have no will; but this arises from a misinterpretation of the phrase, *presumed will*, which, in this sense, does not mean the will that a party actually had, but the will which he would have had, could he have willed.

It is true, that although the will of the proprietor is the great rule of succession, yet the laws of particular states may lay restraints upon will. By the law both of Scotland and England, at one period, no man could convey lands by testament for, *Deus non homo facit heredem*; in our neighbouring country, the rule was altered by statute of Henry VIII; with us it has been gradually destroyed by a contrary practice, by disposing

\* The decisions will be found in one connected view, after the arguments for the parties.

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*mortis causa*; but all such restraints are contrary to the nature of property, and as such are to be strictly interpreted, even within the states where they are imposed; and much less ought they to extend to property situated in other states, where the law leaves the proprietors the natural right of disposing of their properties; besides every such restraint is a discouragement to industry.

By the law of the Twelve tables, the right of disposing by will was acknowledged, and when this was afterwards restrained in favour of children, it was done upon this fiction, that the person who could overlook his own children *furius erat*. Judge Blackstone, l. 447, seems to blame this restraint; his words are, "every man has, or ought to have, by the laws of society, a power over his own property." In England a contrary law at one time prevailed, but it was long ago altered, as imposing an impolitic and unreasonable restraint upon a proprietor. Blackst. II. 402.

The defender shall now apply these principles, which have been explained, to the present question; and the fair conclusion seems to be, that, in intestate succession, the law of the *locus rei sitæ* may follow the *lex domicilii*, or not, according to the grounds which, by the *lex loci rei sitæ*, shall be thought best for presuming the will of the deceased; and when there is a deed by the proprietor, declaring his will, that will ought to be followed, without regard to any restraints imposed by the law of the *domicile*, unless they are such as would create a debt excluding gratuitous alienations.

Property, where there is no will, must be transmitted by the law of the country where it is situated, and that law should follow the presumed will of the deceased in the natural rule of intestate succession. This presumed will may be conjectured in two ways: It may either be presumed according to the ordinary rule *in loco rei sitæ*, or according to the ordinary rule in the country where the deceased lived, that is the *lex domicilii*. It may be doubted which of these rules should be followed; and, were there no separate considerations, the *lex rei sitæ* would naturally, and perhaps justly, prefer its own.

But there is a separate consideration, after a law of intestate succession has been formed a separate presumption arises that the party dying meant that his property should descend according to the rules of that law. Lib. VIII. § 1. de jure Codic. Grotius, Lib. II. c. 7. § 11. In such a presumption it is the *lex domicilii* only that can be referred to, as it is that law only that the deceased can be supposed to have been acquainted with. This forms an additional presumption in favour of the *lex domicilii*; but still it is the custom of the *locus rei sitæ*, that must determine, and it may be held then, that the presumption  
upon

upon which their own law is sovereign, is to just and living, as to overrule that in favour of the law of the domicile.

But wherever there is a testamentary disposition, it is apprehended, can be a subject of law, and this for two reasons; 1. That any restraints upon the effects of the will, imposed by the law of the domicile, will be confined to effects within the territory of the law. 2. The law of a domicile is a permanent one good all the world over, and if he brings his property with him a country, where there is no restraint upon the effects of the will, he will not be limited, neither will the law of his domicile remain in his own country, which may have a contrary limitation.

Both these considerations will apply, though the law of the domicile should refuse the power of a testator to dispose of his property. But should this power of disposal be a subject of law in the territory, by altering the forms of the testament, or of the effects of which it is established, then it is clear, that a testator can alter the restraints of the law of the domicile, and have no objection in *lex rei sitæ*, for, by placing his property in another country, he has taken it out of all the forms of property and conveyance in his own country; and if he alters, by altering the forms of deeds, he might have a similar effect, of effects situated in his own country, he may do as he pleases, where the effects are in another country, by any deed which is there effectual, confidently with propriety and with natural justice.

Great stress has been laid upon a fiction mentioned by some foreign writers, that *testators have no heirs* and therefore that their succession is regulated by the law of the domicile. But to this argument it is sufficient to answer: 1. That a fiction deserves no regard beyond the territory of the law in which it is received; it enables that nation to express and conceive, more easily a point of their own law; to every other nation it is a mere falsehood. 2. The foreign writers referred to are no authorities, in a question of Scotch or English law.

Voet (Comm. ad Pand. Lib. I. tit. 4. pars. 2. de Statut. § 11.) explains this fiction; but whatever use may be made of it in aid of the proprietor's will, it is altogether incongruous to use it for the purpose of defeating his express will; it would be to suppose him willing that his will should not be effectual. Indeed, Voet candidly admits that this fiction can have no effect in extending the law of one state into the territory of another, and he resolves it into mere *comitas*, in the place above quoted, and he goes on to mention those instances where the *lex rei sitæ* would prevail.

The practice of several of the continental states, in paying regard to the law of the domicile, in those *statuta personalia*, has led some of their lawyers, such as Rodenburgh, to imagine that

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this was *de jure*, and not *ex comitate*: But Voet refutes this error (*ibid.* § 5. and § 2.)

It is pretty singular to suppose, that the law of the *domicile* should have effect all the world over; for instance, that a man should be held a minor in Scotland, until he was twenty-five or thirty, or be held a major at sixteen or eighteen, because such was the law of his *domicile*: Yet such appear to have been the opinion of these writers (Voet de statut. §. 7. and 8.).

Voet, in his title *Qui Testamenta facere possunt*, states the case of a person having his *domicile* in Utrecht, where a man cannot make his will before eighteen, and having property in the province of Holland, where any person may convey both heritage and moveables at fourteen; according to the *comitas* there observed, the will would be effectual in Holland, as to the heritage, but not effectual as to moveable property. This is a very extraordinary effect of *comitas*, and were we to adopt the same *comitas*, and were the age of testing at Utrecht, in place of eighteen, twenty-five, a Scotsman domiciled at Utrecht, would be in this situation, that he could dispose of his heritable property, but would be incapable of disposing of his moveable property in this country. But this is a doctrine that would not be easily listened to.

Another strange enough effect of *comitas*, is mentioned by Voet (Lib. XLVIII. tit. 20. § 7.); a forfeiture or act of attainder, will have the effect of forfeiting the party's property, not only in the country of the *domicile* but of the *rei sita*; the sovereign of each, having the benefit of the forfeiture within his own territory. But as this is all *ex comitate*, it can have no authority with us, neither can the opinions of their lawyers have any effect. This practice, however, of allowing the *lex domicilii*, to regulate the succession of moveables was by no means universal, and was often introduced by particular statutes, Christinæus, ad leg. Mechlin. p. 529. 563. 530.

Besides these, there are the following authorities against the *lex domicilii*, Peckius de test. Conjug. Lib. IV. c. 28. Hub. de Jur. Civit. Lib. III. sect. 4. tit. 1. § 22. 23.

It was further contended, on the part of the pursuer, that *nomina*, or debts were to be considered as in *loco domicilii creditoris*, because they exist in the person of the creditor; that every difficulty is obviated, by attending to the distinction betwixt the right of claiming and the obligation of the debtor; the former must be regulated by the law of the creditor's *domicile*, the latter made effectual by the law of the debtor's *domicile*; and it would be strange if the circumstance of the debtor's changing his place of residence shall alter the rule of the creditor's succession either testate or intestate. But in answer to this, the defender maintains, that the *situs* of debts is where the

the debtor resides ; it is there that the subject exists, from which payment is to be operated, and it is there duly that the obligation can have any substantial effects. As to the absurdity of the creditor's right being affected by the change of place in the debtor ; this argument, however plausible, has nothing in it. It is not every occasional change of place, or short residence, that can create a *domicile*, nor consequently occasion any variation in the rule of succession. Besides, a debtor by changing his *domicile*, may confessedly impair the right of his creditor ; he may go to a country, where execution for a debt is not so favourable, or where the distribution of a bankrupt's effects, will be less favourable to that particular creditor, or where the crown may have an extraordinary preference : It is therefore nothing singular that the change of the debtor's *domicile*, should affect the creditor's succession.

But further, in the case of testate succession, the testator's will is the universal rule ; and in intestate succession, if the *lex rei sitæ* be made the rule, then the property of the deceased will be distributed by the judges of the countries where it is situated, in conformity to the rules of presumption there established.

In the case reported by Christinæus, the *situs nominum* was one of the points in dispute, and they were adjudged to be *ad domicilium debitoris*. The foreign doctors held different opinions ; but the majority seem to have been in favour of this decision, p. 531. and 563. Tiraquellus cites a number of authors, besides those cited by Christinæus, who were of opinion that, “ *nomina sunt ejusdem loci cujus est debitor.*” Tiraquel. de Retract. gentil. § 36, Gloss. 3. n. 15. 16. 17.

As to the authorities in our law, various decisions plainly import that *nomina* are held to have their *situs* where the debtor resides ; and Dirleton, in his Doubts, (Nom. Debit.—Strangers—Testament), seems plainly to hold this doctrine, though his commentator Stewart inclines to a contrary opinion.

The right to a debt due in Scotland, does not vest, *ipso jure*, in the assignees under an English commission of bankruptcy, though if the *situs* were understood to be in England, the place of the creditor's *domicile*, the right of the assignees, would be complete. Again it has been found, that the assignation to a debt, due by a debtor in Scotland, is not complete without intimation, whatever may be the law of the creditor's country ; and the arrestment of a debt in Scotland, and its transmission, shows plainly, that the *situs* of the debt is where the debtor resides.

Upon this point, therefore, the defender submits, that whether it is to be judged by the rules of the law of Scotland, or by general principles, the conclusion will be the same, that  
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the *status* of the debt is in the place where it must be recovered, that is where the debtor resides.

The pursuers have endeavoured to draw some aid to their plea in favour of the *lex domicilii*, from the paramount right which every state has over the property of its subjects; and they have referred to M. Vattel on the law of nations. But this author does not say that the state where the person is *domiciled* has any title to insist that its law of succession shall regulate the succession of property situated in a different state: And Voet, and all the other lawyers are agreed, that when this is permitted, it is only *ex comitate*, and not of right. But further, the state can have no interest in the matter, it is a matter of indifference whether the succession goes to one of its subjects, or to another. It is needless, however, to enter further into this subject, as M. Vattel's doctrine does not accord with the plea of either of the parties. The one pleads for the *lex rei sitæ*, and the other for the *lex domicilii*. But, according to M. Vattel, it is the *lex originis*, *la loi de la patrie* that must regulate a man's succession; and it is believed the pursuers will hardly adopt this doctrine, seeing Mrs. Lashly is a native of England.

The defender, shall now add a few words upon that influence which the law of the *domicile* (upon general principles) ought to have in regard to succession.

In intestate succession, the presumption in favour of the *lex domicilii* must be greatly weakened from the uncertainty of the rule, since a man may be *domiciled* in a country with which he has only a temporary connection, and where he does not intend to remain. If the judges of the *locus rei sitæ* are to follow, *ab intestato*, the *lex domicilii*, they will often follow a rule not only destitute of authority with them, and perhaps less reasonable than their own, but also contrary to every presumption that can be formed of the party's intention.

But the same consideration has infinitely greater weight in testate succession, where the question is betwixt the will of the deceased and the law of the *domicile*, and whether the law of another country should follow the one or the other. The will of the proprietor is a safe and universal rule. The title of the law of the *domicile*, in regard to another country, is of a very different complexion. To follow the law of a mutable *domicile*, would be an unnecessary and inexpedient violation of the rights of property; to make this rule regulate a person's succession, in opposition to his own will, merely because he happened to die in the place where he had his *domicile*, would be highly unjust.

If it is pretended, that the law of the *domicile* should overrule the will of the proprietor, it must be on the ground of an obli-

obligation created ; but if he had changed his *domicile*, the obligation would have clearly ceased ; and this shows that there is no obligation ; since there never can be an obligation, in the proper sense of the word, when the party has it in his power by a voluntary act of his, to put an end to it. When the influence of the law of the *domicile* is thus defeasible by a change of place, it would be most extraordinary if the courts of law of another country should follow it, in opposition both to their own law and to the will of the proprietor.

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On the whole, in every view of the question on general principles, the conclusion seems to be the same : That, in succession *ab intestato*, the *lex domicilii*, or the *lex rei sitæ*, may be followed according as the one or the other shall be fixed on as most agreeable to the presumed will. But that in the case of testate succession, the will of the proprietor should always be preferred to the law of the *domicile*, with respect to effects not situated within its territory.

The defender shall now proceed to consider the municipal law of Scotland upon this question, which, as he apprehends, follows the *lex rei sitæ*, both in succession *ab intestato* and in the case of testate succession.

The doctrine of our law should show itself in two ways ; if it follows the *lex rei sitæ*, it will neither extend its own regulations to foreign effects, nor will it suffer foreign regulations to have operation as to the effects in this country : On the other hand, if it adopts the *lex domicilii*, while it endeavours to extend its own rules to effects abroad, it must allow the law of a foreign *domicile* to have full operation with regard to effects here ; we have therefore a double test for discovering the rule of our laws.

Lord Stair, I. 1. 16, says, that the law of Scotland regulates the succession of Scotsmen in Scotland, though dying abroad, and resident there. Lord Bankton, in the most express terms, delivers it as the law of Scotland, that the *lex rei sitæ* is the rule both in testate, and intestate succession, B. I tit. I. § 82. 83 †.

The only authorities founded on by the pursuers were two passages ; one from Kames' Principles of Equity, the other from Mr. Erskine's Institutes, both founded on the decision in the case of Brown of Braid, and both relating to intestate succession only. But these authorities can never be put in competition with the numerous train of authorities which establish the *lex rei sitæ* as the rule, even in intestate succession.

The pursuer has rested upon the opinion given in the House of Lords, when the judgement in the case of Bryce was affirmed ; and every thing coming from that quarter, is entitled

† The authorities principally founded on by the defender are the decisions ; but these are thrown into one view, as has been already observed.

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to the highest respect. But the defender must observe, with the utmost deference, that the opinion was given incidentally, upon a point not necessary for the determination of the cause, and it appears to have been considered as a question of the law of Scotland, and reference was made as laying down the law in favour of the *domicile*. But when the whole authorities shall come to be considered, a different opinion will probably be entertained; and where no contrary judgement of the House of Lords appears, the defender conceives that he is at liberty to follow the decision of the Court of Session.

Before leaving the law of Scotland, the defender shall say a few words upon the nature of the right of *legitim*, as it operates within Scotland, which affords a separate argument against extending any restraint which attends it, to property in other countries.

The right of *legitim* is a right of succession and not a right of division; and in this it differs from the right of the relict. It extends to a certain share of property, which the law characterises as moveable; and for that reason, among others, it must be confined within Scotland. It is a rule, that this *legitim* shall not be taken away by testament: but this restraint is nominal, not real; for the father has a power over all his property situated in Scotland, if he be attentive to exercise it in the proper form. The father may alienate gratuitously without limit in his own life; nay, he may convey gratuitously his moveable property, reserving his own liferent. He may provide by his own marriage-contract, that the *legitim* shall not take place, 17th June 1732, Stirling of Glorat. He may convert his moveable property into money, and employ the money in the purchase of land; or he may lend it out on heritable bonds, or bonds secluding executors, or with substitutions; and he may then dispose of it by deeds of a testamentary nature. These changes are a mere point of form; but the change which took place in this case are much stronger and more substantial. Where money is taken up out of Scots bills, for example, and vested in the English funds, it is rendered subject to the English law, which gives the proprietor the full power of testing.

The pursuer has maintained, that the law of England follows the *lex domicilii* in intestate succession; and the case of Thom v. Watkins is referred to. But, in answer to this, the defender must observe, that it is of no consequence in this question what is the law of either country in intestate succession, since no inference can be drawn thence to testamentary succession; and further, this decision, which is but a single one, will hardly be sufficient to fix the law upon this point. The opinion upon which great weight is laid, and to which every degree of respect is justly due, was an incidental opinion,  
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and contrary to that entertained by other great English lawyers\*.

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The defender shall add one or two observations in support of the argument on the law of Scotland, by taking a view of it in conjunction with the law of England.

The churchmen in both countries, took the administration, and even the property of goods, of parties deceased (1540. c. 120, Black. 2. 495.): they were the heirs *ab intestato* in moveables, and then the *lex rei sitæ* must have been followed. But when the laws of the different countries came to take away more and more the rights of the churchmen; as they took from them, they gave to those whom the laws of the different countries favoured, that is the successors *ab intestato* according to the law of the *locus rei sitæ*.

The English personal estate consists of leases and mortgages, which we reckon heritable: Now, suppose a man domiciled in England to die, leaving a brother and a nephew, who, by the

\* Reference was made to the opinion of Sir Dudley Ryder, what follows is an abstract of the memorial laid before that lawyer, and a copy of his opinion.

Alexander Lord Banff was born and educated in Scotland, and had his principal domicile and estate there; but for many years past had been commander of his Majesty's ship the Tilbury. His Lordship was for the most part at sea; when on shore, sometimes in England, and sometimes in Scotland; he was never married. While his Lordship was in England he had no settled domicile, but occasionally took lodgings. In May 1746, he fell into a bad state of health, which obliged him to give up his command. He went to Lisbon for the recovery of his health, and died there in November 1746. After his death, a holograph testament was found by him, leaving his real estate in Scotland to a stranger; but this deed contained no directions as to his personal estate, and, with respect to it, he is to be considered as having died intestate. His personal estate consisted of money and clothes at Lisbon, brought afterwards to London, of India and Bank bonds, and Bank stocks in England, and in Scotland of arrears of rent, &c

Mrs. Mary Ogilvy, sister-german to the former Lord Banff, was aunt and nearest of kin to the late Lord. John Law is a son of another sister of the former Lord Banff's. The defunct's mother was married again, and left three sons; but she died some years ago.

*Quest. 1.* Whether will the succession to the defunct's personal estate in England be regulated by the law of Scotland, the place of his nativity and domicile, or by the law of England? *Answer,* If administration is taken out in England, as it may be, and such administrator gets in any of the effects, they must be administered according to the law of England.

*Quest. 2.* Whether will the succession lying at Lisbon at the time of his death, and now brought to London, be regulated by the law of England or Scotland? *Answer,* If administrator here gets such effects, I conceive they must be administered according to the English law.

*Quest. 3.* Are the brothers uterine, by the law of England, preferable to the administration and property of his personal estate, to Mrs. Mary his full aunt by the father? *Answer,* Such brothers uterine, are by the English law, preferred to the aunt on the father's side.

*Quest. 4.* If Mrs. Mary is preferable to the brothers uterine, whether will John Law, in right of his mother, be admitted to the administration and property equal with Mrs. Mary his aunt? *Answer,* Mrs. Mary is not preferable by the English law to the brothers uterine, nor equal to them.

(Signed)

D. RYDER.

21<sup>st</sup> March 1747.

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English law of representation, succeed equally to his personal estate, but the nephew is his heir at law in Scotland, where it shall be supposed he has a valuable property in leases, and also moveable property. The nephew, as heir, carries off the leases, which, by the law of England, he must have divided with his uncle as part of the personal estate. It would be hard, in this situation, if the uncle were not at liberty to take advantage of the law of Scotland, to exclude the nephew from the moveables.

Again, when our law directs the next of kin to be preferred in confirmation, it makes no exception of the case of foreigners having moveable estates situated in this country, how then could the commissaries go directly contrary to the law, by confirming a brother's son co-executor with a brother, because the law of another place admits of a representation in moveables? Besides, the executor is bound to make distribution, not only to the relations, but to the creditors of the deceased, and in this the distribution of the estates in the two countries, very clearly appears.

The English administrator must distribute the personal estate according to the law of England to the creditors, and he must prefer those who have judgement debts, in the first order; next debts by specialty; and postponed to these are debts by simple contract. But it will not surely be said, that these rules would affect personal property in Scotland, though it had belonged to a person *domiciled* in England; and on the other hand, the *pari passu* preference to those, who cite the executor within six months, given by the law of Scotland, would have no influence with respect to the personal estate in England. But if the law of each country thus regulates the distribution to creditors according to its own rules, why should it not distribute the rest of the estate to the relations by the same rules? If the *lex rei sitæ* regulates the one case, it certainly ought to regulate the other.

Before the defender concludes, he cannot omit to take notice, that it would be extremely singular if this regulation of the law of Scotland, respecting the childrens third part, were suffered to over-rule a will in England, when a similar regulation of the law of England has yielded to the favour due to wills, (Blackstone, 2. 492.—Bacon, 1. 584.—Pred. Chan. 596.) Mere *comitas* cannot give more effect to the law of Scotland than what has been given to the ancient law of England. Another consideration must also have weight against this *comitas*. Voet and other foreign writers, referred to by the pursuer, admit that *comitas* does not require the admission of a rule which would be prejudicial to the state. This, however, is conclusive against the pursuer; since the adoption of the *lex domicilii* would tend to the prejudice of England, by discouraging

raging foreigners from lodging their money in the English funds. The defender shall here conclude what he had to offer on this important general question.

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A U T H O R I T I E S .

1. Purves v. Chisholm, 1st February 1611, Haddington. Abridged in Dict. I 320. “ A Scotsman, born a bastard, “ dying in England, his goods will fall under escheat to the “ King, and the donator will have right thereto, notwith- “ standing any testament made by the bastard unconfirmed in “ England. And albeit that bastards are alledged to have *testa- “ menti factionem* there.”

2. Henderson's Bairns v. Debtors, December 9. 1623, Durie. Colonel Henderson dying in Flanders, institutes his children his universal heirs. His money had been lent out on heritable bonds. The Court found, that none of the children could pursue for their obligations, but he who could be served heir, according to the law of Scotland.

3. Melvile v. Drummond, July 16. 1634, Durie. Melvile pursued Drummond for the sum in an heritable bond left in legacy by an English settlement. The Court found, that the pursuer could not pursue for the same, by the practice or law of this realm ; for *bona, tam mobilia quam immobilia, regulantur juxta legis loci, quo bona ea jacent et sita sunt.*

4. June 16. 1656, Craig v. Lord Traquair. Decis. during the Usurpation : precisely similar to Melvile's.

5. Lewis v. Shaw, January 19. 1665, collected by Lord Stair, and by Gilmour. William Shaw, a Scotsman, settled at London, as a merchant, and possessed of moveable property both in England and Scotland, settled his whole property upon Anna Lewis his wife, by a muncupative testament, which is allowed in England. This testament was proved in the English Courts, and the wife brought an action against the nearest in kin in Scotland, who had confirmed the Scots moveables. According to Lord Stair's report, “ The Lords having confi- “ dered the reasons, and former decisions, preferred the execu- “ tors confirmed in Scotland ; for they found, that the question “ was not here of the manner of probation of a nomination, in “ which case, they would have followed the law of the place ; “ but it was upon the constitution of the essentials of a right, “ viz. a nomination, which albeit it were certainly known to “ have been by word ; yea if it were offered to be proven by the “ nearest of kin, that they were witnesses thereto, yet the so- “ lemunity of writ not being interposed, the nomination is in “ itself defective and null *in substantialibus.*”

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6. Bisset v. Brown, 19th July 1666, Dirleton. "It was found  
 " *nemine contradicente*, that a stranger residing in Holland *animo*  
 " *morandi*, though, by the law of the place, his nearest in kin,  
 " without confirmation, has right to all goods or debts be-  
 " longing to him; yet if the debts or goods be due by Scotf-  
 " men, they cannot pursue for the same, unless the right  
 " be settled upon them, according to the law of Scotland, by  
 " confirmation, if they be moveables; or by a service, if they  
 " be heritable." This is also collected by Stair.

7. Intromission with the effects of a Scotsman situated in a foreign country does not infer vitious intromission, Neilson, 1st July, 1619, Lord Dingwall v. Vendome. Harcarfe, No. 41, March 1683, Archbishop of Glas. v. Bruntsfield, Dict. Vol. I. p. 318.

8. Dryden v. Elliot and Ainslie, March 1684, Harcarfe. An English woman pursuing for a debt, due to herself in Scotland, the defender alledged compensation upon a debt due by her husband, for whom she was administratrix. The Lords sustained this answer to the defence, "That the pursuer cannot be liable as administratrix in England, for debts due in Scotland, seeing she is not confirmed executrix, as to any sums owing there to her husband; and as administratrix of his English debts, can only be pursued in England, where he who was an Englishman died."

9. Gray v. Earl of Selkirk, 22d July 1708, Fountainhall. Dict. Vol. I. 318. In a competition betwixt an arrestment and an assignation after the English form, the Lords preferred the arrester, as, with regard to all steps of diligence taken in Scotland, the laws of Scotland must be the rule.

10. Brown v. Brown, Nov. 28, 1744, Kilkerran *vice* Foreign; and Falconer p. 11. Captain Brown of the Royal Scots, died at Edinburgh, intestate, leaving some Irish debentures and notes. A competition arose betwixt a brother of Captain Brown's, the nearest in kin by the Scots law, and a nephew of Captain Brown's claiming under the right of representation known in the law of England, which is also the law of Ireland where the effects were situated. The Lords found, that this case was to be determined by the law of nations, and by it the *domicile* of the creditor must be the rule.

Observation for the pursuers. This is the first direct determination upon the question of succession *ab intestato* where the *lex domicilii vel originis* was in opposition to the *lex rei sita*, and it is a decision of the greatest weight.

Answer for the defender. The case relates to intestate succession; and although the *lex domicilii* may be allowed to prevail against presumed will, it does not thence follow that it will prevail against express will in the case of testate succession. Besides, in the next case to be quoted, Morrison v. Earl of Su-

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Sutherland, this decision was thought by the Court to be, C A S E  
erroneous.

11. *Morrison v. Earl of Sutherland*, 1749, Kilkerran *voca* Foreign. Morrison was found lunatic upon a commission of lunacy in England, and a committee appointed. The committee instituted a suit in Scotland, by attorney, against the Earl of Sutherland upon a bond. The Court were of opinion, that the commission of lunacy had no effect in Scotland, and the committee no right to pursue. This was represented to Lord Chancellor Hardwicke, who ordered access to be given to the lunatic, who signed a letter of attorney, reciting the facts, and amongst others the commission in England. The Court again decided against the pursuers, upon this new ground, that the letter of attorney was *felō de se*. It was observed in the report, that the Court, although they had no opportunity of deciding the point, seemed rather to lean to the opinion, that moveables are to be governed *secundum leges loci*, and as to *nomina debitorum* that they are to be considered as situated in the country where the debtor and his estate are situated; "opinions very different from the judgement given between the Representatives of Brown of Braid, 28th November 1744." This cause was appealed, and the judgement was reversed in the House of Peers. There are no opinions upon that case; but the opinion delivered by the Lord Chancellor (Hardwicke), in the case of *Thorne v. Watkins*, applies to it, his Lordship then said, "all debts follow the person, not of the debtor in respect of the right of property, but of the creditor, to whom due, &c. This also came in question in the House of Lords lately, in a case arising on the lunacy of Mr. Morrison; for there the question was, whether the rule would be the same in the courts of Scotland? and the opinion was, that it would be the same."

12. *Lorimer v. Mortimers*, Feb. 1. 1770. The question here arose betwixt the sister of Lorimer, and neices and nephews of his by a sister deceased; the latter contending, that as Mr. Lorimer had been domiciled in England, and as *mobilia*, and especially *nomina debitorum*, must be understood *sequi personam*, they ought agreeably to the law of England to be admitted to the succession *jure representationis*. The judgement of the Lord Ordinary was, "In respect the testator William Lorimer was a Scotsman, who had passed the greater part of his lifetime in Scotland, and thereafter had resided sometimes in England, and at other times in Scotland, and after making his will, left Britain, in order to reside some time in Italy, but died at sea on his voyage thither, finds, that his succession, so far as not regulated by the will, must be regulated by the law of Scotland and prefers the sister." And that judgement was adhered to upon advising a petition and answers.

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13. *Elcherfon v. Davidson*, January 13. 1778 \*. William Murray died at Hamburgh, without making any settlement, leaving effects situated there. Elcherfon, the mother of the deceased, claimed the succession, as heir by the law of that country. On the other hand, a claim was made by Davidson, in right of the executors by the law of Scotland. These claims were made in a multiplepinding brought by a Danish merchant in Hamburgh, in whose custody the effects were. The Court found, “ That the distribution of the moveables, in  
 “ this case, must be regulated by the laws of Hamburgh where  
 “ these moveables are, and were situated at the death of Wil-  
 “ liam Murray: That no action for such distribution lies, or  
 “ is competent before this Court: Therefore dismisses the pro-  
 “ cess of multiplepinding and competition relative thereto.”

14. *Helen Henderson v. John M'Lean*, 13th January 1778. Captain John M'Lean died in the Mogul empire; before his death, he executed a will there, in favour of his father, brother, and sister. The funds, on the death of Captain M'Lean were recovered, and remitted to Scotland, where a claim was made by the widow for the third of the moveables as her's *jure relicte*. The Court found, “ That the widow had no  
 “ claim to a *jus relicte* out of the effects and estate of Captain  
 “ M'Lean conveyed by the will.”

15. *Mary Morris v. Robert Wright*, 19th January 1785. Mary Morris, as next of kin, according to the law of England, brought an action against Wright, who as executor by the law of Scotland, had intromitted with moveable effects, situated in this country, but which had belonged to a person whose *domicile* was in England. The Court considered the point as settled, and that the *lex rei sitæ* was the rule; and therefore they unanimously sustained the defences.

16. *John Hay Balfour v. Miss Henrietta Scott*, November 15. 1787. David Scott of Scotstarvet, was *domiciled* in England, where he died. He left a land estate in Scotland, which went by destination to Miss Scott. Scotstarvet left also a large personal estate in England, and Miss Scott as nearest of kin claimed also a right to her share of the personal estate in England. The Court found, “ That the succession to the personal estate  
 “ in England, falls to be regulated by the law of England.”

17. *Bruce v. Bruce*, 25th June 1788. A competition arose betwixt the brother consanguinean and the sisters-german of Major William Bruce, with regard to the distribution of his property. The circumstances of the case are given in the Lord Ordinary's judgement. “ Finds, 1. That as Major Bruce  
 “ was in the service of the East India Company, and not in a

\* The decision in this and the next case went chiefly on the authority of Sir Dudley Ryder's opinion. In particular President Craigie and Lord Pitfour rested their opinions on it.

“ regiment on the British establishment, which might have  
 “ been in India only occasionally; and as he was not on his  
 “ way to Scotland, nor had declared any fixed and settled in-  
 “ tention to return thither at any particular time, India must  
 “ be considered as the place of his *domicile*. 2. That as all his  
 “ effects were either in India, or in the hands of the East In-  
 “ dia Company, or of others his debtors in England, though  
 “ he had granted letters of attorney to some of his friends  
 “ in Scotland, empowering them to uplift those debts, his *rei*  
 “ *situs* must be considered to be in England: Therefore finds,  
 “ that the English law must be the rule in this case for deter-  
 “ mining the succession of Major Bruce; and consequently  
 “ that James Bruce of Kinnaird is entitled to succeed, alongst  
 “ with Elisabeth and Margaret Bruce his sisters.” A reclaim-  
 ing petition was refused, without answers, and the cause  
 being appealed, the decision was affirmed by the House of  
 Peers †.

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† In the Lord Chancellor's speech upon this cause, he says, “ Two reasons  
 “ were assigned for having declared, that the distribution of Mr. Bruce's personal  
 “ estate, ought to be according to the law of England: 1. That India, a coun-  
 “ try subject to that law, was to be held as the place of his *domicilium*, and cer-  
 “ tain circumstances were mentioned, from which that was inferred. These he  
 “ considered only as circumstances in the case, and not as necessary circumstan-  
 “ ces: that is, though these had been wanting, the same conclusion might have  
 “ been inferred from other circumstances: In his mind, the whole circumstan-  
 “ ces of Bruce's life led to the same conclusion. The second reason assigned by  
 “ the interlocutor, was, that the property of the deceased, which was the subject  
 “ of distribution, was at the time of his death in India or in England. As to this,  
 “ he founded so little upon it, that he professed not to see how the property could  
 “ be considered as in England. It consisted of debts owing to the deceased, or  
 “ money in bills of exchange drawn on the India Company: Debts have no *situs*;  
 “ they follow the person of the creditor. That proposition in the interlocutor  
 “ therefore fails in effect.

“ But the true ground on which the cause turned, was the deceased being *do-*  
 “ *micated* in India. He was born in Scotland, but he had no property there.  
 “ A person's origin in a question, Where is his *domicile*? is to be reckoned  
 “ as but one circumstance in evidence, which may aid other circumstances;  
 “ but it is an erroneous proposition, that a person is to be held *domiciled* where  
 “ he drew his first breath, without adding something, more unequivocal. A per-  
 “ son being at a place, is *prima facie* evidence that he is *domiciled* at that place;  
 “ and it lies on them, who say otherwise, to rebut that evidence. It may be re-  
 “ butted no doubt: A person may be travelling on a visit; he may be there for  
 “ a time, on account of health or business: A soldier may be ordered for Flan-  
 “ ders, and may be detained at a place there for many months; the case of am-  
 “ bassadors, &c. But what will make a person's *domicile* or home, in contradic-  
 “ tion to those cases, must occur to every one. A British man settles as a mer-  
 “ chant abroad; he enjoys the privileges of the place; he may mean to return  
 “ when he has made his fortune: But if he die in the interval, will it be main-  
 “ tained, that he had his *domicile* at home? In this case, Major Bruce left Scot-  
 “ land in his early years; he went to India, returned to England, and remained  
 “ there for two years, without so much as visiting Scotland; and then went  
 “ again to India, and lived there sixteen years, and died. He meant to return  
 “ to his native country it is said; and let it be granted that he then meant to  
 “ change his *domicile*; but he died before actually changing it. These, his Lord-  
 “ ship

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Lord *Dreghorn*.—Prior to the decision in the case of Brown of Braid, I understood that the *lex domicilii* ought to be the rule in intestate succession: And this rule ought to take place,  
 1. As the inextricable difficulty which must be the consequence of adopting the rule of the *lex rei sitæ* is thereby avoided:  
 2. Because the courts in England have taken the *lex domicilii* as the rule. This question, however, does not relate to succession *ab intestato*. There is a will; and when this case was last before the court, I concurred in the general opinion; but I now see reason for returning to the opinion expressed in my own interlocutor. Had the law of Scotland decided on this point *contra bonos mores*, the foreign judge might then have refused execution. There was an instance of this in the case of the negro claiming his liberty before this Court, where the law of Jamaica was opposed to the claim, and rejected by your Lordships as unjust. Were the law of Scotland contrary to morality, there would be a good ground for an English judge to refuse giving execution to it. But the law of Scotland is founded in reason, and entitled to favour; and the observations of foreign authors, that moveables are to be held as in *transitu* from the foreign country to the *domicile*, is founded in good sense. I am, therefore, for returning to the decision which I originally gave in this cause.

Lord *Swinton*.—The question is, Whether the *lex domicilii* or the *lex rei sitæ* ought to regulate Mr. Hogg's succession? I am of opinion with the judgement expressed in the interlocutor of the Lord Ordinary, that the *lex domicilii* ought to be the rule. It is unnecessary to discuss, whether intestate succession ought to be regulated *jure civili*, or *jure naturæ*. It is sufficient if the distribution of effects be made *jure civili*, and that it is so is clear from this, that were it made *jure naturæ* the rule would be the same in all countries: But it differs in every different state, and this shows that the distribution is made *jure civili*. But here we must take in expediency and utility, and

“ship said, were the grounds of his opinion, though he would move a simple affirmation of the decree. But he would not hesitate, as from himself, to lay down the law generally, that personal property follows the person of the owner, and, in case of his decease, must go according to the law of the country where he had his *domicile*; for the actual *situs* of the goods has no influence. He observed, that some of the best writers in Scotland lay this down expressly to be the law of that country; and he quoted Mr. Erskine's Institutes as directly in point. In one case, it was clearly so decided in the Court of Session. In the other cases, which had been relied on as favourable, if the doctrine or *lex rei sitæ*, is to govern, though the *domicilium* of the deceased be without contradiction in a different country, it is a gross misapplication of the rules of the civil law and *jus gentium*; though the law of Scotland, on this point, is constantly asserted to be founded on them.”

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these joined to consuetude, are the principles which must regulate our decision.

As to expediency and utility, there can be no doubt that judging by these, the *lex domicilii* must be the rule; for where a man dies with effects situated in many different countries, the relations have only to enquire, what is the law of the country where the deceased had his *domicile*? and the evidence of this law they produce in the different countries where the effects are situated, as the vouchers of their title; which saves the endless enquiries and confusion which would arise were the *lex rei sitæ* to be adopted. Besides, the distribution would be more just and equal, than if different, and perhaps contradictory rules of succession were to be admitted:—so much for expediency. As to consuetude, the authorities of Voet, Christianæus, and the other foreign writers, as well as the many respectable English judgements and opinions, establish, not only the general principles of expediency, but the universal custom of nations.

Before concluding I shall say a few words with respect to maxim, *mobilia non habent sequelam*. It is a fiction, and the like all legal fictions, is held for truth, for the purpose of expediency and justice. Thus, the *fiction postliminii*, in the civil law, and the *fiction legis Corneliæ*, were palpable untruths, and yet held for truths, in order to preserve their legal rights to those who fell in battle, or were made prisoners of war and carried into slavery. The fiction here, is of the same nature; and property situated in different countries, is held to be within the country of the proprietor's *domicile*. These arguments are equally applicable to testate as to intestate succession; and upon the whole I am of opinion with the judgement pronounced by the Lord Ordinary.

Lord *Dunfinnan*.—I am clear, after much reading and reflection on the subject, that the *lex domicilii* must regulate this decision. Intestate succession is said to depend on presumed will; but there is here express will, which must supersede the presumption: yet I do not think that this express will can defeat the right of *legitim*. It does not appear to have been Mr. Hogg's intention to withdraw his funds from the law of this country, in order that they might be regulated by the law of England, which might proceed by a rule different from that by which the succession to the remaining part of his estate was to be governed, and with which last rule alone it is to be presumed he was acquainted. I am therefore clearly of opinion, that the *lex domicilii* is the rule.

Lord *Justice Clerk*.—I have formed a very decided opinion upon this subject. The pleadings were very ingenious; but I had fixed my opinion before, and I found there nothing to shake it. The gentlemen very properly argued the question, whether

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ther the succession of moveables *ab intestato* is to be regulated by the *lex domicilii*, or by the *lex rei sitæ*? and on a full consideration of the decision in the case of Brown of Braid, and of the judgements of the English Courts, I am clearly of opinion, that intestate succession must be regulated by the *lex domicilii*; and so I shall decide whenever the question occurs.

In the course of the argument, the maxim *mobilia non habent situm*, was much insisted on by the one party, and denied by the other. On mature consideration, I think it a good maxim of law to a certain effect; and the effect is this, that when speaking of intestate succession, the only foundation of which is presumed will, it is most agreeable to the principles of the Roman law, (the law of right reason,) that the succession should be regulated by the law of the *domicile*, rather than by that of the territory where the moveables are situated. It is understood in the eye of law, that as the proprietor of moveables has it in his power to bring them to the place where he is himself fixed, he would have done so had he had time; and here we see the good sense of the rule which says, that moveables have no *situs*. If it be asked to whom must a deceased have meant his subjects to go? The answer would be, to those who would have been entitled to them, had his intention been fully executed, and his effects transferred to the place of his *domicile*; to those pointed out by the law of the place *ubi habet larem et focum*. It is unreasonable that his effects should be distributed according to the different laws of the various countries in which the subjects may be situated.

This fiction of law, then, is established to give force to the presumed will of the deceased; and, *a fortiori*, must it give force to his declared will. If, therefore, a man dispose of his moveables by a deed clearly showing his intention, that deed will be made effectual. Every country has its own forms by which deeds are authenticated, and it is impossible for a man to adhere to all the solemnities which may be requisite by the laws of the different countries in which his effects are situated. If, therefore, his deed disposing of his moveable property be duly authenticated, according to the forms of the place where it is executed, it must receive effect all the world over; and so far I think moveables have no *situs*. But, on the other hand, the law in many cases, acknowledges the *situs* of moveables. It allows of a fiction, in order to give force to the presumed will of a proprietor, and much more to render effectual his declared will; but it will never admit of a fiction contrary to the real nature of things, for the purpose of overturning his express will. In such a case the law of the state where the subjects are situated must be the rule.

A commission of bankruptcy in England carries no right to effects situated in this country. The creditors of the bankrupt  
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may point or arrest these effects, and acquire preference over the English commissioners; and there the law acknowledges the *situs* of moveables. In the same way, if an Englishman has effects in this country, they must be attached by his creditors according to the forms of our law, and not by those of the English law, upon the fiction that they follow the person of the owner. And this shows, that when you go in opposition to the will of the proprietor, you must have recourse to the law of the country where the subjects lie, not to that of the *domicile*.

I come now to the case of burdens on property. The fiction is received to enable the law to favour the proprietor, to enlarge and facilitate his powers; but never can it be turned to an opposite effect. Where the question occurs whether a man's property be burdened, recourse must be had to the law of that country where the subjects are situated, and enquiry must be made whether by that law they are subject to any burden; for law presumes no man to submit to a burden which he can avoid. Why then make a fiction, (intended to favour a proprietor,) have the effect of bringing his property under a burden to which he does not mean to subject it?

I shall suppose, that in this country, his Majesty were entitled to a certain share of the moveable effects of every person dying here. A man acquainted with this law, and unwilling that any part of his property should go to the King, sends it to England; could his Majesty, on the death of this man, in virtue of the fiction of law, claim any part of the goods situated in England, and sent there for the express purpose of defeating the claim? There would be neither reason nor justice in extending the fiction to such a case. Before the Reformation, a man must have paid a *quot* to the ecclesiastics for the moveable property to which he succeeded. Had the former proprietor, in order to free his heir from this burden, sent his property to England, or to any other country where there was no such law, would the heir have been forced to confirm to the amount of the succession, although no part of it was situated in this country? Surely not.

This paves the way for the decision of the present question: And I shall now suppose that a native of this country lives and dies here; that he makes a settlement disinheriting his wife and children, and leaving all his property to A. B. When the will is carried to England, where I suppose part of the subjects to lie, in order to its being proved in the Prerogative Court, the widow and children appear, and a competition arises. The English judge naturally enquires on what title the widow and children make their claim; the answer would be, that the claims are founded on the *legitim* and *jus relictae* of the law of Scotland. It comes then (as was very properly argued by Mr.

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Fergusson and the Dean of Faculty) to be a mere question in the law of Scotland with regard to the nature of the obligation that lies on a husband, and on a father. Is he subject to a proper legal obligation by which he is bound to give his wife and child a certain share of his funds? for, if so, it is a debt in which his heir must be liable all the world over; and the judge of an English court, would enforce the payment of it, as he is bound to see justice done to the parties coming before him. It is this idea which is the foundation of the opinion given by the German doctors. If, then, the claim of the wife and children be of this kind, there is no doubt that it cannot be defeated by the will of the deceased, and it would be enforced in England. But it is not a claim of this kind, there is no legal obligation upon the husband; for until he is on deathbed, he has the full and entire disposal of his effects situated in Scotland. He may defeat the right of the wife and children, by purchasing land with the produce of his moveable estate; or by laying it out on bonds secluding executors; or, he may take another way, and he may, as Major Agnew did, dispoise his moveables *inter vivos* reserving his own life; or, there is still another mode, a husband may, in his marriage-contract, stipulate an exclusion of the *legitim* and *jus relictae*, for a small conventional provision, and then neither the wife nor the children will have any claim; as was decided in the case of Dirleton.

If, then, we see that the rights of the wife and children may be defeated in all these different ways, and that in this case there was a most express intention of defeating them, can we bring the moveables from the operation of those laws by which they are naturally governed, and subject them to the laws of another country by the magic of fiction, (intended to encrease, but in no instance to diminish, the powers of a proprietor,) and that for the mere purpose of defeating the expressed will?

I shall only observe, with respect to the claim, as founded on the wife's share of the goods in communion, that it can extend no further than to the goods situated in that country where the co-partnery is acknowledged.

This is a point which it is of the greatest importance to fix. Mr. Hogg lived, while in consequence of the decisions of this Court, the law of Scotland was held to stand in the way I have stated: if you decide otherways, you alter that law upon which Mr. Hogg's settlements were made. In another view, I must be of opinion, that no good can come from rendering children independent of their parents.

Lord Fiskgrove.—I had occasion to consider this question in Elcherson's case; and I then argued myself into a complete conviction, that the *lex rei sitæ* should be the rule of succession.

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From that time, until the present case occurred, I never entertained a doubt upon the subject. In forming that judgement, the circumstance which principally influenced me was, that the laws of Scotland could have no effect beyond the bounds of this kingdom; and the same idea was taken up by the Court, in the judgement which they pronounced upon that occasion. I see from my notes, that Lord Kaimes said, that the *lex rei sitæ* should be the rule, since the *corpus* of a moveable has a *situs* as well as land: That a declaratory action, where the effects were not within the jurisdiction of the Court, was absurd, since it was in that situation no more than an advice, to which foreign judges were not bound to pay any attention. So that the Court proceeded upon this idea, that in order to render a judgement effectual, the goods in dispute must be placed within the jurisdiction of the Court, and that judges ought always to decide by the law of their own countries. And were the fact consistent with the theory, this judgement would be decisive: I have, however, to regret that this Court has been forced to decide a question which ought to have been decided by the English courts.

I must acknowledge, that in forming an opinion in this cause, I have been much swayed by the early impressions I received. I expected to have got more support to the opinion I held, from the Lord Justice Clerk: But his Lordship has made several admissions which deserve notice. He has admitted, that wherever there is a legal obligation, it ought to be made effectual, even in a foreign country: But he holds this not to be an obligation of that nature. The right of *legitim*, however, is a right effectual in *suo genere*; it may be destroyed, no doubt, and it is not an obligation for a precise sum, nor has it existence till the death of the father. But it is a right of succession, and gives the child a claim of the same kind over the moveable succession, which the heir has over the heritage: He may, in virtue of that right, challenge all deeds executed on death-bed, all deeds *mortis causa*; it differs so far from the right of the heir, that it vests *ipso jure*, and requires no service. Now, Mrs. Lashley's father has, by his will, taken from his *hereditas jacens*, what the law of this country does not permit him to take. He may, it is true, dispose of his property during his lifetime, and so leave nothing at his death, which can be affected by the claim of *legitim*; but where he leaves funds, of a nature affectable by this claim, he cannot disappoint it by a testament.

In Brown of Braid's case, the *lex domicilii* was adopted; and I agree with the Lord Justice Clerk, that the after decisions were wrong. If then the *lex domicilii* be the rule in *intestate* succession, where is the difference betwixt that and the present case? There can be none; for to the extent of the *legitim*, every

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every man must die intestate ; since it is a part of his moveable effects over which he has no power of making a will, and we seem to be unanimous, that in intestate succession the law of the *domicile* must be the rule.

Where a man makes a will, he must do it according to the law of the country where he is *domiciled* ; and he can test over those subjects only which by that law can be conveyed by a will ; therefore, wherever the law of *legitim* is known, that part of the testator's property, falling under the *legitim*, must be held to be intestate succession, since it is a part which cannot be affected by his will.

Lord *Henderland*.—The question here is, whether the Court can extend a mere municipal regulation, and give it the effect of directing the succession to goods situated in a foreign country, contrary to the express will of the proprietor, appearing in his testament ? Mr. Hogg acquired a fortune in England ; he married there, and the principal part of his personal estate remained in that country ; although he purchased a landed estate here, Mr. Hogg's long residence in England must have taught him its laws : He executes a rational deed. Now, in these circumstances, shall we judge of this deed, in so far as it regards his effects situated in England, by the rules of our law ? Certainly, unless we be tied down by express law, or by very powerful reasons of expediency, we cannot give force to this municipal regulation, so as to prevent a man from disposing of an English fortune acquired in that country, and left under the distribution of the English law.

I have considered this question attentively. Voet, the most sensible of the commentators, shows us, in his title *De Statutis*, what authority is due to most of those doctors we have heard of ; they are all mistaken in laying it down, that municipal regulations extend *extra territorium*. We decide the contrary, on the clearest principles, *extra territorium jus dicenti impune non paretur* ; and hence I conclude, that we can give no force to mere municipal regulations, in regard to effects not placed within the territory subject to our laws.

Voet puts the maxim, that *mobilia non habent situm*, on two grounds : 1<sup>st</sup>, Upon presumed will. And upon this principle, the decision given in the case of Brown of Braid is well founded. But when this principle is to be applied to a case where a will is made by a man who lived and carried on business in the foreign country where the subjects are situated, and who must be presumed to be acquainted with the law of that country, shall we support his presumed will to the destruction of his declared will ? Surely not. The fiction is to be applied only to the case of intestate succession. It does not apply universally : To questions of forfeiture, of diligence, &c. it does not apply. It appears to me to be a *petitio principii*, to say

say that Mr. Hogg is under a partial incapacity, with regard to the effects situated in England. It is true, the deed has no effect in Scotland over the subjects situated there, and falling under the right of *legitim*, in consequence of the partial and municipal incapacity created by our laws. But it does not follow as a consequence of this, that Mr. Hogg is under any incapacity of testing on the effects situated in England.

The *second* ground upon which Voet puts this maxim is the *comitas* due from one state to another: But this is not applicable to the case before us.

Sir Dudley Ryder was a good common law lawyer, and his opinion upon the law of England was right. Lord Chancellor Hardwicke, in the opinion which he delivers, puts it chiefly upon the danger which might be done to the funds, by deterring foreigners from lodging their money there, were the property of foreigners to be distributed according to the rules of the law of England. But the true ground of the decision is the respect due to the presumed will of the deceased; a principle which does not at all affect the present case.

Lord Rockville.—I cannot consider the circumstances of Mr. Hogg's placing his money in the funds, as any indication of a design to withdraw it from any operation of the laws of this country.

Lord President.—England and Scotland are different with respect to their municipal laws. Questions as to the effect of foreign deeds have been frequently before this Court. It was the mistake of an English counsel which led to that opinion which so long prevailed here, in favour of the *lex rei sitæ*. The opinion was received by Lord President Craigie, Lord Pittfour, and other respectable lawyers, and was followed by the younger lawyers of those days. The mistake was made in the answers to a memorial in Lord Bamff's case. Lord Bamff was an officer in the royal navy, he had a Scotch estate, he had a furnished house in London, he went abroad for his health, and died in Lisbon. It was difficult in this case to say, where the *domicile* was. A short memorial was laid before Sir Dudley Ryder, for his opinion; and, without entering at all into the general question, in regard to the *domicile*, his answer was, that the money in the funds ought to be distributed according to the law of England. This was the foundation of the opinion taken up by our lawyers, and it influenced the decision in Elcherson's case. One other case was decided in the same way, and under the same mistake.

In the case of Morris, the Court pronounced their decision, with their eyes open to the law, and to the real principles of the English decisions; but they thought themselves tied down by the cases which had been formerly decided in this Court.

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The case was decided in less than five minutes: Has not Elcherson's case, and M'Lean's been decided on the *lex rei sitæ*, and is not this exactly the same. Such was the reasoning upon which this last cause was decided.

I shall not go back to the case of intestate succession, that has been well decided. In regard to testate succession, I am as much a convert as the Lord Justice Clerk was in the case of intestate succession. Here there has been no expression of will to affect this question. Mr. Hogg entailed his landed estate; he gave his moveable estate to his son, burdened with the condition, that he was to convert it into ready money, and after discharging debts and other burdens, to apply the residue in the purchase of land. One of these burdens is the *legitim*. By the settlement, L. 2500 is directed to be given to Mrs. Lashley, in full of her *legitim*; had she accepted of this, in full of that claim, there was an end of the question. But how is she bound to make this election? In no shape is she bound; she may reject the provision, and resort to her legal claim. There has therefore been no expression of will, with respect to the *legitim*: had it been expressly excluded by Mr. Hogg, then the question might have been, Whether he had a power so to do? But he has made no such exclusion.

With regard to the nature of *legitim*, it does not appear to be the idea of lawyers that any distinction should be drawn betwixt effects in one situation, and in another; but simply that the children should have a certain share from the moveable funds. Is it possible, that the circumstance of a debtor's going out of the country, with my property in his hands, should have the effect of altering my succession, and of depriving my wife and children of their rights? Surely not. Or, supposing a will to be made, with an intention of defeating these rights, there can be no difference whether the effects, to be carried by that will, are placed here, or in a foreign country; in this case the maxim *mobilia non habent sequelam* is right. When a person has occasion to recover effects he must go to the country where they are situated, and he must recover them according to the *lex rei sitæ*. But with regard to the succession of these effects, it must be regulated by the *lex domicilii*. In general, the right of succession must be governed by the law of the testator's *domicile*, and in *nomina debitorum*, it is by the law of the creditor's *domicile*, not by that of the debtor's.

With regard to the reasoning of Lord Justice Clerk. His Lordship considers the *lex domicilii* to be the presumed will, consequently the rule of succession, where no will is expressed; and therefore that a different rule ought to be followed where there is a will. But I am inclined to doubt, whether presumed will be the true principle; at least the one  
upon

upon which this question can be universally decided. There are many cases where a man has evidently had no will at all, with regard to the distribution of his effects, and others, where he was utterly incapable of willing; and yet, in all of these, the law of the *domicile* is allowed to regulate his succession. But without entering into this, let us stretch every point, and give every degree of effect to declared will; this only brings us back to the power of the testator, and a testator has certainly no power to exclude the claim of *legitim*. C A S E  
1.  
}

But it has been said, that it is odd not to allow the will to be effectual, when by the law of Scotland the *legitim* may be defeated by other means. Were this a sufficient argument, the same would be equally applicable to the law of death bed; for it is in the power of a proprietor, to put his funds in such a situation, that any deed executed by him will not fall under that law.

Here, I take it, there was no *facultas testandi*. Mr. Hogg, it is true was not prevented from giving away his funds, during his lifetime, and had he actually done so, the present question could not have arisen: But he did not give them away, and the question comes to be a mere question of succession. The will which has been executed, Mr. Hogg had no authority to make, there is a certain part of his moveable estate, over which, by the law of this country, he cannot test, and it must go to the heirs pointed out by law.

State of the vote, Adhere, or Alter.

Adhere, Lords Justice Clerk, Swinton, Ankerville, Henderland.

Alter, Lords Elkgrove, Alva, Rockville, Hailes, Dunfinnan, Dreghorn.

Lord Monboddo did not vote.

“ The Lords having advised the petition, with the answers thereto, and having heard counsel for the parties, they *find*, that the succession to the personal effects of the deceased Mr. Hogg, wherever situated, must be regulated by the *lex domicilii*, and therefore they alter the interlocutor reclaimed against; *find*, that the pursuer's right of *legitim* extends to such personal effects in England, or elsewhere, as well as in Scotland; and remit to the Lord Ordinary to proceed accordingly.” Judgement,  
June 7. 1791.

Against this judgement a petition was presented for the defender Mr. Hogg, which was appointed to be answered; the arguments in these papers, have been already fully detailed; when the cause came again to be advised, the following opinions were delivered.

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Lord

## C A S E

I.

Opinions.

Lord *Monboddo*—declared himself in favour of the *lex domicilii*, and rested his opinion principally upon the opinion delivered by the Lord Chancellor in the case of *Thorne v. Watkins*.

Lord *Dreghorn*.—As to Mr. Hogg's intention, there can be no doubt: the only doubt is in relation to his power; and with regard to that, I must consider the Scots law as extending its influence over all Mr. Hogg's moveable property wherever situated. The effects situated in England, fall under the law of Scotland, as much as the effects do which are situated in this country. The operation of the law of the *domicile* I hold to be universal, and I am for adhering.

Lord *Eskgrove*.—My original opinion was in favour of the *lex rei sitæ*. I was perhaps led into this opinion from having been engaged in supporting that side of the question in *Elcherfon's* case. At that time it appeared to me to be consistent with expediency and justice; but my opinion is now altered.

The judges in England have pronounced a number of decisions in favour of the *lex domicilii*, and these, as decisions upon a question *juris gentium*, must have great weight. Lord Hardwicke, in particular, has decided in favour of the *lex domicilii*, and has urged many excellent reasons, in support of his decision. These decisions must also have weight on this account, that as they are not decisions upon municipal law, but upon the law of nations, the judgement in England would be the same, whether the case arose in an English court, or came by appeal from the courts of this country. Accordingly, in the case of *Bruce*, we see this principle applied; and although in France, or in Holland, a different rule may be followed, there ought to be one uniform rule in this country; and should the English judges return to the *lex rei sitæ* (which perhaps ought to have prevailed), I should be for adopting it.

In the case of intestate succession, the *lex domicilii* is held to be the rule, for this reason, that a man must be presumed to subject himself to the laws of the country where he resides. He must be presumed to know them, and consequently, if he declares no will in regard to distribution of his effects, to intend that they should be distributed by those laws. As to Mr. Hogg's intention in this case, it is very clear, that he could never mean to give more to a disobedient daughter, than to those daughters who had not offended him. But the question is not what was Mr. Hogg's intention? it is what has Mr. Hogg actually done; supposing it to have been clearly his intention to have defeated the *legitim*, has he done it?

Much has been said on the question of Mr. Hogg's powers: But I am by no means of opinion, that because he might have defeated the claim of *legitim* had he followed those modes authorised by law, he can therefore defeat it by other means.

A

A man may disinherit his heir, while he remains in *liege poustie*. But it does not follow that he can disinherit him while he lies on death-bed.

C A S E

I.

The right of *legitim*, is not merely a right of succession, it is a *jus crediti* in the children, depending on the nature and situation of the father's funds at the time of his death. Were it a succession, the children would be obliged to make up titles to it. But there is no occasion for this, the law considers the right as vesting *ipso jure*. If then the right of *legitim* gives a *jus crediti* to the children in the moveable funds of the father to a certain extent, it is evident that the question here must be precisely the same, as if there had been no will; for in fact there is no will as to this part, since the law of Scotland does not permit a testament to defeat the claim of *legitim*. The question then is decided; for it is a settled point of law that the *lex domicilii* must be the rule in intestate succession.

Contrary, therefore, to what was originally my opinion upon this point, and to what would still be my opinion, were it not for the English decisions, and those pronounced in the court of the last resort, I am for adhering to the interlocutor.

Lord Justice Clerk.—After much deliberation I think that the *lex domicilii*, must be the rule in intestate succession. This I think a consistent, the other a distracting rule. Law supposes moveables, and *nomina debitorum* to follow the person of the proprietor, to the effect of distributing them according to his implied will. But with regard to testate succession, I cannot see why the same rule should be applied. There is good sense in adopting the rule thus far, that where a testament is executed according to the forms of that country where the testator resides, it ought to be good all the world over. But where a will is once made, the *lex testamenti* is the only rule.

The fiction which places the *situs* of moveables in the *domicile* of the proprietor, is intended solely to give him the power of disposing of them; for, in all other respects, moveables have a *situs* in the countries within which they are actually situated. Thus, supposing that a proprietor is unwilling to convey his effects, how are his creditors to attach the subject? they must do it according to the *lex rei sitæ*, and this is as clear a proposition as the other. The matter therefore just comes to this, that where express or implied will is to carry the property, the *lex domicilii* is the rule; whereas, on the other hand, when property is to be conveyed not by will, but perhaps against it by the operation of law, it is the *lex rei sitæ* which must be the rule. But the present question is one totally different, it is a question of power; it is a question with respect to a burden on property, and the point of enquiry is, whether burdens are to be judged of by the *lex domicilii*, or by the *lex rei sitæ*?

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I.

*sita*? and it is very clear that it is by the *lex rei sita* they must be judged.

There are many countries where burdens are imposed upon property, in favour of the prince or of the church. These will be exacted according to the laws of the place where the goods are actually situated. And this is not a matter of will; for there can be no doubt, that every man would chuse to free his property of burdens, were it in his power. But if burdens are made effectual by the law of the country where the effects are situated, can it be maintained, that these effects are also to be burdened with the conditions and restrictions of the law of the proprietor's *domicile*.

If the *legitim* be a *jus crediti*, as it was in ancient Rome, or as it is at this day in Germany, it must clearly be effectual every where: And it is to such cases of legal obligation, that the authorities quoted in the papers, and in the pleadings apply. But the right of *legitim* is not of this nature, a husband and father has the free disposal of his funds, until he be on death-bed. He may, prior to that give them away, or he may change their nature, so as to defeat the right, as has been determined both here, and in the House of Peers, in Dirleton's case, and others. This being the law in regard to the *legitim*, it evidently does not give a *jus crediti* to the child. If the English effects were under the law of *legitim*, before the testament was executed, certainly the testament could not take them out of it. But this was not the case, they were placed in England, for the purpose of excluding the *legitim*. The only question then is, whether, by placing these effects in England, Mr. Hogg, did not as completely exclude the *legitim*, as if he had converted them into heritable bonds; and of this there can be no doubt.

Judgement.  
Nov. 29. 1791.

The Lords having advised the petition and answers, they adhere to the interlocutors reclaimed against.

This judgement was brought before the House of Peers by appeal.

May 7, 1792.

It was ordered, that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For Pursuer, Mr. Solicitor General,  
A Wight, and  
J. Clerk,  
Defender, Lord Advocate, Dean  
of Faculty, G. Ferguson,  
and M. Ross.

Advocates.

Ja. Gibson, W. S.

Lauch. Duff,

Agents.

Lord Dreghorn Ordinary.

Sinclair Clerk

Vol. VIII. No. 12.

SU.

## SUPERIOR AND VASSAL.

**Mrs. HENRIETTA KERR, and Others, Trustees of the deceased  
JEAN Marchionefs of Lothian ; Pursuers,**

A G A I N S T

**Mr. WILLIAM SIMPSON of Viewfield, Defender.**

A vassal, where the coal in the feu has been reserved, and afterwards sold by the superior, is not entitled to retain his feu duties, for the indemnification of damages done by working the coal, though the payment of such damages be one of the conditions of the original feu-right.

THE question betwixt the parties in this cause, resolved not only into a claim of retention of the feu-duties for indemnification of the loss suffered by the vassal, in working the coal ; but the Court having found that he had no such right, there was a separate question, whether the vassal was liable for the interest of the feu-duties, during the time that they had remained in his hands. The latter of these questions, will be found under the title *Interest*, p. 290, of this Collection, the former shall be slightly stated here \*.

C A S E  
I.

The clause upon which the question turns, is contained in the original feu-right, granted by George Lord Ross, the pursuer's author, to the defender's father. It is a reservation,  
 “ to us, our heirs, and assignees, of all and singular mines of  
 “ gold, silver, copper, lead, coal, &c. we and our forefairs,  
 “ always satisfying and paying the whole damages which the  
 “ said Andrew Simpson and his forefairs shall sustain thereby  
 “ (that is, by searching for, or working the mines, &c.) accord-  
 “ ing as such damages shall be ascertained by two indifferent per-  
 “ sons, of whom one to be chosen by us, and our forefairs, and  
 “ the other by the said Andrew Simpson and his forefairs, as

\* The compiler is sorry to find, that the loss of his notes upon this case will prevent him from giving even a hint of the grounds upon which the Court proceeded in deciding it. He has inserted the case, merely because it has been referred to in p. 290, as collected here.

“ arbi-

## ARGUMENT FOR THE SUPERIOR.

Previous to the feu-contract in the 1748, Lord Rofs was absolute proprietor of the lands of Pendrich, including the coal and other minerals, and it was optional for him, either to have granted a feu of the whole, or to have feued the lands to one, and the coal to another; or to have feued the one, and reserved the other. What Lord Rofs actually did, was to grant a feu of the land, exclusive of the coal, and by the conception of the feu-right, reserve the coal to himself and his assignees. His Lordship had, therefore, two rights in his person; he was superior of the subject feued to Mr. Simpson, and with regard to the coal, he was absolute proprietor, in the same way as before the feu-right existed.

In feudal grants where lands are conveyed without reservation, a right to the coal and minerals as well as to the soil, is understood to be given; though even that was doubted in Sir Thomas Craig's time; but it never was disputed that the right to a coal may be separated from the right to the surface. Mr. Erskine considers coal to be in the same situation with a mill, and equally capable of being made a separate tenement, B. II. tit. 6. § 5. Indeed nothing is more common than that the land and the coal, should be held by distinct feudal rights; and so frequent had this become, before the end of the last century, that we find the form in Dallas's Collection.

The decisions which relate to the question whether the right of superiority can be divided, and which have been quoted for the vassal, do not apply. Mr. Simpson, the vassal in the lands, was not the vassal in the coal, the full undivided property of which remained with Lord Rofs, in the same manner as if Simpson's feu-right never had existed; and Simpson might, with equal propriety, have maintained that any mill, or field, lying within the bounds of the feu, and reserved from the feu-right, made part of the right of superiority, as that the coal made part of such right. In point of law, therefore, the coal was separable from the superiority, and by the sale in favour of Mr. Clerk, was actually separated from it.

It has been said, in answer to this, that Mr. Clerk's was only a base right. But in fact the full property was conveyed to that gentleman, as it was conveyed to be holden blanch for payment of a penny Scots, *si petatur tantum*; and after this the superior could be no longer liable, unless on the footing that the claim of damages was a burden inseparable from the superiority.

Supposing then, the coal to have been alienable as a separate tenement, and to have been alienated to Mr. Clerk, against whom does the claim for the coal damages lie? Certainly against Mr. Clerk, and against him alone. Burdens arising from

the exercise of property, are effectual against the proprietor for the time; and when the property is alienated, they are transferred *ipso jure* against the singular successor. Thus the various obligations arising from the feudal relations of the superior and vassal, are effectual only against the superior or vassal for the time; and when either alienates, he is from that moment freed from all future feudal obligations.

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I.

The Marquis of Lothian was no party to the original feu-contract, and consequently was not personally bound to implement any of the obligations therein contained. The only footing upon which he became liable, was as proprietor of the coal; and having conveyed that property to Mr. Clerk, the obligation upon him must cease.

The Court upon advising this cause, “ Altered the Lord Ordinary’s interlocutor reclaimed from, and found Mr. Simpson entitled to retain the feu-duties, stipulated in the original feu-contract entered into with Lord Ross, in security of any damage which he has sustained, or may sustain by the reservation in that contract, of working the coal in the lands, &c.”

Judgement.  
June 27. 1790.

This judgement was brought under review, by the superior; and the Court having ordered a hearing in presence, their Lordships returned to the judgement pronounced by the Lord Ordinary; and they afterwards refused a petition for Mr. Simpson, the vassal, upon advising it with answers.

|                                          |   |            |            |   |         |
|------------------------------------------|---|------------|------------|---|---------|
| For the Superior, Mr. Solicitor General, | } | Advocates. | J. Walker, | } | Agents. |
| Mr. Tait,                                |   |            | W. S.      |   |         |
| Vassal, Dean of Faculty,                 |   |            | R. Young.  |   |         |
| M. Ross, and Maconochie,                 |   |            |            |   |         |

Lord Dreghorn Ordinary.

Gordon Clerk.

Vol. VIII. No. 13.

# TRUST-RIGHT.

DAVID ALLAN, and Others,

AGAINST

Mr. JAMES M'CRAE, and Others.

An action is competent at the instance of a private society, against their trustees, for forcing them to denude of subjects in which they stand feudally vested, for behoof of the society.

## CASE

### I.

A number of people in the parish of Fettercairn in Kincardineshire, dissatisfied with the settlement of a parish minister, formed themselves into a separate congregation, under the name of Bereans. Having resolved to build a house of worship for the use of the society, the expence of which was to be defrayed by a voluntary contribution, they feued from Mr. Valentine of Wester Pitgarvie, a piece of ground; taking the disposition to David Allan and twelve others, as managers appointed for building a meeting-house for divine worship, and to their successors in office. At the same time, the dispoonees bound themselves as managers, and their successors in office, for the price, to be paid by certain instalments. The feudal right was vested by investment in these trustees. The congregation called Mr. M'Crae to be their pastor; but some time afterwards a schism arising in the congregation, some of the congregation wished to remove Mr. M'Crae from the charge. For this purpose an action of removing was brought against him, at the instance of David Allan, with concurrence of a majority of the survivors of the original trustees, and of the heirs of such as were dead.

The sheriff, "in respect, no voucher is produced, vesting the  
" right of possession of the ground in question in the defender  
" Mr. M'Crae, decerned in the removing against him, in  
" terms of the libel." This judgement was brought under  
June 28. 1789. review by advocacy. Lord Hailes refused the bill, declaring his  
opinion by a note in these words: "All that Lord Hailes has to  
" consider is, to whom a piece of ground feued out, and now  
" built

“ built upon, belongs. He thinks that the ground and the house  
 “ belong, for any thing yet done, to the feuers of Mr. Valentia .  
 “ Some of the original feuers, and the heirs of others, desire to  
 “ have possession of the ground and house. None of the original  
 “ feuers or their heirs make any opposition ; and on this the  
 “ judgement is founded. Whether they, who thus are entitled to  
 “ sion, may not be obliged to denude in favour of the persons  
 “ called successors in office, must be an after consideration,  
 “ when such successors appear, and show that there is an of-  
 “ fice to which there can be a succession. All this remains  
 “ entire ; any other judgement would encroach on the religi-  
 “ ous opinions of men under legal toleration ; and it is thought  
 “ the civil courts will be tender in touching on such matters.”

A declarator was now brought, at the instance of Mr. McCrae and his adherents, and thirteen people said to be managers for the congregation at that time, concluding that Allan and the rest of the original trustees, feued to the society, should denude to them. The bill of advocation having been passed in consequence of a remit from the Court ; the actions were conjoined, and informations ordered to the Court. The only point of law in the case, was whether an action was competent at the instance of the majority of a private society, against their trustees, to denude. This was not argued by the parties ; for each agreed in the general proposition. The only question was on its application to this case, and much was said by either party in proof, that they constituted the true majority and body of the society.

On the point of law, the four following precedents were mentioned :

1<sup>st</sup>, The case of Gibb's meeting-house, Edinburgh, 1752. where Gibb, and a great body of his hearers, having differed from the rest of the congregation, brought an action against the original trustee, to denude. But the Court found, that the pursuers had no sufficient title to insist in the action, and therefore dismissed it.

2<sup>dly</sup>, The case of a meeting-house in Lanark, 1757. A congregation, the lease of whose ground was held by five tacksmen as trustees, having divided, the Court found, “ that the right  
 “ to the tack, and the ordering and managing of the meeting-  
 “ house, is in the tacksmen of the ground upon which it is  
 “ built, and the majority of them : That the defenders, being  
 “ four of the tacksmen, are entitled to the care and manage-  
 “ ment of the said house as a place of public-worship ; and that  
 “ the pursuer, the only other tacksmen, might concur with the  
 “ defenders therein, but cannot dispossess them thereof.”

3<sup>dly</sup>, Case of Jobson from Dundee, 1771. The subject was in this case vested in Jobson, as sole trustee for behoof of the congregation. The minister deviating from the principles of the

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I.

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the society, and the trustee going with him, a great majority of the congregation insisted, that the trustee should denude to trustees named by them. Lord Monboddo, before whom the question came, found, “ in respect, Mr. Jobson, the defender, admitted in his deposition, that he understood the right to the meeting-house and area in question, to be a trust in his person, for behoof of the anti-burgher congregation; and that it appears, that the pursuers, with those that concur with them, were a majority of that congregation, at the time of the trust; sustains the pursuers’ title to carry on this action; and *finds*, that the defender is bound to denude himself of that trust, in their favour, upon being reimbursed of the money laid out by him, whereof he is not already indemnified.” And to this judgement the Court adhered upon advising informations.

4thly, Case of Smith, &c. v. Henderson, from Falkirk, 11th August 1779. Where a decision was given (on the principles that were fixed in Jobson’s case) in a question upon the effect of an inhibition against a trustee in the right of a meeting-house.

Opinions.

On the point of law, Lord *Justice Clerk* said, A doctrine was prevalent, when I came to the bar, that no private society, or unincorporated body of men, could maintain an action; that the power of prosecution, belonged only to corporate bodies. This opinion gave occasion to many frauds; but it is now fixed that every person holding a feudal subject, as trustee for others, is bound, when called upon, to denude in their favour. In this case the subject is feudally vested in trustees, who hold not for themselves, but for the behoof of the congregation. A congregation may have a declarator of trust. Here these trustees, hold expressly as trustees, and must denude, when called on by those having a proper right. The real contributors, those who have created the subject, are the proprietors. It is they who must decide on such a question, as has here occurred; the trustees have no right to turn out, or keep in, ministers, against the consent of their constituents. The only question is, where is the majority?

May 25. 1791.

The rest of the opinions went upon the special question, whether Allan and his party, or M’Crae and his adherents, were to be considered as the bulk of the society? The judgement of the Court was conceived in nearly the same terms with that in Jobson’s case. “ The Lords *find*, that the feudal right obtained from Alexander Valentine in 1773, by David Allan and others, as managers appointed for building a meeting-house for divine worship, was a trust in their persons,

“ sons, for behoof of the contributors for purchasing the area,  
 “ and building the meeting-house in question; *find*, that the said  
 “ trustees, are bound to denude themselves of said trust, in fa-  
 “ vour of the said contributors, or the majority of them, or  
 “ managers named by the majority, upon being reimbursed of  
 “ the money laid out by them, or any of them, upon the sub-  
 “ jects in question, whereof they are not already indemnified;  
 “ and remit to the Lord Ordinary to proceed accordingly, and  
 “ to do further in the cause, as he shall see just.”

C A S E



For Allan, &c. Mr. Solicitor—Stewart, } Advocates. J. Tawse, } Agents  
 M'Crae, &c. Dean of Fac.—Gillies, } Geo. Watson, }

Lord Dreghorn, Ordinary.

Sinclair Clerk.

Vol. VIII. No. 14.

## II. JAMES DEWAR, and Others, Creditors upon the estate of Redcastle, objecting Creditors,

AGAINST

The Trustees of the deceased GEORGE ROSS of Cro-  
 marty, Esq; Claimant.

Trustees, empowered to borrow money for certain purposes, and give heritable securities, give an heritable security beyond this power, but the truster having authorised the security, and received the money for which it was executed, it was found to give the holder a preference over posterior creditors in a ranking.

IN the marriage-contract of Captain Kenneth M'Kenzie, his  
 father Roderick M'Kenzie, disposed the estate of Redcastle to  
 himself in life-rent, and his son, &c. in fee. Afterwards they  
 both concurred in executing a trust-deed, disposing the estate  
 of Redcastle to trustees, for payment of the principal and inte-  
 rest of certain debts, contained in a list subscribed by them, as  
 relative to the trust-deed, and ordered to be registered along  
 with the instrument. And power was given to the trustees to  
 borrow money for payment of the debts before-mentioned, or  
 any part thereof, and to grant heritable securities for the same,  
 over the lands, barony, and others before-mentioned; and if  
 ne-

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I.



Aug. 17. 1767.  
 Jan. 22. 1778.

C A S E  
II.

necessary, “ to sell the lands, &c. or such parts as should appear necessary ; and apply the produce and price thereof for “ the uses and purposes, &c.” Infestment followed, and was registered ; and along with it the list of debts was recorded. In 1781, while the estate remained in the hands of the trustees, a personal bond had been granted by Roderick M’Kenzie the liferenter, and Kenneth the fiar, to George Ross of Cromarty for L. 800 Sterling. This was followed by an heritable security granted by the trustees of Redcastle, to the said George Ross, Esq; &c. proceeding on the narrative of the personal bond, and “ that previous to the said George Ross his advancing the “ said sum of L. 800 (which he did to the said Kenneth “ M’Kenzie, for enabling him to raise the independent company, of which he is now captain), it was stipulated and “ agreed, not only that the said Roderick and Kenneth “ M’Kenzie should grant the bond before narrated ; but also, “ that we, as trustees foresaid, without binding ourselves personally, should grant heritable security to the said George “ Ross, over the said lands and barony of Redcastle, for the said “ sum of L. 800, and interest, &c. to take effect immediately “ after the payment of the several debts, and other sums mentioned in the said disposition, and for payment of which the “ said trust was granted.” Accordingly, they give the heritable

April 1781. security under that condition ; and Mr. Ross was infest. In December 1787, the trustees reconveyed the estate to Captain Kenneth M’Kenzie the fiar (the father being dead), but “ with “ and under the burden of the several debts in the list before- “ mentioned, and therein particularly enumerated ; which several sums are hereby declared to be a lien and real burden “ on the lands and others hereby disposed.”

The estate having been brought to a judicial sale, two competitions arose ; one between the creditors at large of Roderick and Kenneth M’Kenzie, and those creditors whose debts had been enumerated in the list ; the other between the creditors at large, and the trustees of Ross of Cromarty. In the former, the creditors, whose debts had been enumerated in the list, stated, that they had a real security, in virtue of the trust-deed and infestment thereon : But Lord Justice Clerk, “ in respect the trust-right contains a power to the trustees to give “ up the same ; and as they did not carry the trust into execution, but gave it up, and that the lands have been sold by “ authority of this Court, sustained the objection to the said “ trust-disposition : and found, that the trust-creditors have no “ right to claim under the same.” And on the question’s being brought before the Court, the judgement was affirmed by

Dec. 21, 1790.

Jan. 27, 1791. an interlocutor, finding, that “ in respect the debts were not “ rendered real burdens on the lands by the trust-right ; and

“ in

“ in respect that the trust-right has been given up and abandoned, the desire of the petition must be refused, and the interlocutor of the Lord Ordinary adhered to.” The second petition was refused, without answers.

C A S E

II.

In the other competition, the creditors at large contended :  
*1<sup>st</sup>*, That the trustees on Redcastle had no power to grant an heritable security to Rofs of Cromarty. *2<sup>dly</sup>*, That supposing they had, the security which they granted must, from the very conception of it, be postponed to the debts of the creditors in the list ; and as they had been found not preferable under the trust, so Rofs's postponed debt cannot be preferable.

Lord Justice Clerk found, “ that the trustees of George Rofs of Cromarty, cannot claim in this ranking, upon their heritable securities, to the prejudice of the creditors of the bankrupt, meant to have been preferred by the trust-deed ; but prefers them according to the date of the said George Rofs's infestment, in any competition with the other creditors of the bankrupt.”

June 9. 1791.

The creditors at large brought this judgement under review, in so far as it preferred Rofs's trustees, according to the date of their infestment, in competition with them.

It is a fundamental proposition, that no heritable security can give a preference to the creditors over others, unless completed in due and legal form, and granted by one legally entitled to grant it. Now, in this case, the only security granted by Roderick or Kenneth M-Kenzie, was a personal bond ; the heritable security was granted by the trustees on Redcastle, and by them alone : and if they had no power to grant it, there can be no preference. By the trust-deed, the trustees were empowered to borrow money and grant heritable securities, for the sole purpose of paying off the debts contained in the list, and for no other. Their powers flowed only from the trust-deed, and it did not authorise them to give securities for new contractions subsequent to its own date. The heritable bond to Rofs was therefore illegal, and cannot authorise the infestment.

Argument for  
the creditors.

It had been argued before the Lord Ordinary, that Rofs stipulated, before advancing the money, that he should receive this heritable security. But such stipulation (supposing it to be proved by the narrative of the bond) cannot supply the want of infestment ; and there is no legal infestment, since the personal bond granted by the truiters could not authorise infestment, and since the trustees had no power to grant heritable security.

It was also argued that the powers of selling vested in the trustees, made them fiars to all intents and purposes ; and there-

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II.



therefore authorised them to grant securities to any extent. But, 1<sup>st</sup>, The trust was for special purposes, mentioned in the deed of trust, and the powers of the trustees limited to these purposes. 2<sup>dly</sup>, It has been finally decided, that even the creditor meant to have been preferred under the trust, had no real security, though the trusters re-conveyed the estate under the condition of these debts forming “ a lien, and real burden on the lands.” Much less, then, had the trustees a power contrary to the terms of the trust-deed, to give heritable security for new debts contracted after the date of the trust-deed.

On advising the petition the following opinions were delivered, and the petition was refused.  
June 21. 1792.

Opinions.

Lord *Eskgrove*.—The only difficulty is, whether the narrative here, be sufficient to establish *per se*, that the consent of Redcastle and his son, was given to this heritable security; if so, or if this fact can be otherways established, the heritable security must stand; for it is sufficient that the deed was authorised by the trusters.

Lord *President*.—It is an important circumstance in the case that the money was employed for the use of the son. The trustees had, by the trust-deed, a right to borrow money and grant heritable securities for it. 'Tis true, this was for certain purposes only. But suppose that no mention had been made of the purposes for which they were empowered to borrow, their borrowings, and their heritable securities, would have been good, to whatever use the money had been applied. Now we see, in the case, what has happened, the son who is fiar, has received the money; his consent, therefore must be presumed.

Lord *Eskgrove*.—It is clear that the son might have required the trustees to denude when the purposes of the trust were fulfilled. If so, he must have the power of adding to the purposes of the trust.

A second reclaiming petition was presented, which was appointed to be answered; and, upon advising these, the following opinions were delivered:

Opinions.

Lord *Swinton*.—This question does not depend on the construction of the letters; for I am clear, from the completion of the whole, that the trustees were authorised by the trusters to give the bond; but my doubt is, that in a question with other creditors, these creditors saw no power in the trustees to grant the security, the consent given by the trusters did not enter the records.

Lord *Justice Clerk*.—You will observe, that the trustees were in possession of the feudal right; they might have given a good title to a purchaser; and the purchaser would not have been



been bound to have attended to the application of the price. They had also a power to borrow money, and burden the estate, and the lender had nothing to do with the application of the money they borrowed: They would have done wrong had they borrowed money, and not applied it in paying off the debts; still the creditor would have had a good claim: They were bound to execute the purposes of the trust; but their failure in that respect does not affect their acts. The private consent of the trustees, in this case, was enough; and as the trustees were possessed of the feudal right, a missive was sufficient to enable them to execute the bond in favour of Mr. Ross. The letters which passed, show clearly, that the truster could not have complained that the trustees, by granting that bond had abused their trust: this refers to the right of the truster. And with regard to creditors, there is no anterior creditor by investment, and the posterior creditors can have no better right than that of the truster; consequently the security must be good against them also.

Lord *Eskgrove*.—I am of the opinion expressed in the interlocutor reclaimed against, upon the grounds stated by the Lord Justice Clerk. I shall suppose that a competing creditor had looked into the records; he would there have seen that the trustees had the power of disposing of the estate by sale, or of burdening it by granting heritable securities; and had he seen this, and looked into the heritable bond granted to Mr. Ross, this competing creditor would have been bound to have made still farther enquiries, in order to have discovered whether the transaction was truly under the authority of the truster; and therefore, the competing creditors here either did not act on the faith of the records, or they did not take the proper means of satisfying themselves.

Lord *President*.—The trustees might have applied the price of the estate to the purposes for which the money in question was borrowed; and they are to be considered as having borrowed it, as there is an implied mandate in the circumstances of the transaction. I am therefore of the same opinion with that expressed in the interlocutor.

The Court adhered.

Dec. 4. 1792.

Lords Swinton, Dreghorn and Dunsinnan were for altering.

For the Claimant, Cha. Hay, }  
Objectors, D. Cathcart, } Advocates.

J. Anderson, W. S. }  
K. M'Kenzie, W. S. } Agents.

Lord Justice Clerk, Ordinary.

Hume, Clerk.

Vol. VIII. No. 15.

### III. ROBERT M'NAIR, Merchant in Glasgow, Pursuer,

AGAINST

THOMAS M'NAIR, and Others, Defenders.

A settlement appointing a series of trustees for managing a succession, is not to be reduced, although it may contain whimsical conditions and purposes which may eventually exhaust the succession, and put an end to the trust.

C A S E  
III.

ROBERT M'NAIR merchant in Glasgow, was proprietor of some houses in Glasgow, and of some land in the neighbourhood of that town, he was also possessed of some moveable property. This subject he conveyed in the following terms, viz. "In favour of Robert M'Nair, my eldest son, as trustee and fiduciary for my spouse and children, herein after named and designed, and for the ends and purposes after-mentioned; and failing him by decease to his eldest male heir for the time; and failing heirs-male of his body, to my eldest heir-female for the time; and so on through my whole heirs both male and female: the eldest heir-female, always succeeding without division, and including heirs-portioners; all whom failing, to my nearest heirs or assignees whomsoever: (But all for the ends and purposes after-mentioned,) all and sundry, lands, heritages, goods, gear, debts, and sums of money, &c. that shall be pertaining and belonging, or addebted and owing to me at the time of my death." This deed makes no provision for the trustee being a minor, or otherways incapable of acting; neither does it provide for the case of his refusing to act. The purposes of the trust are: 1st, The payment of the granter's debts; but no power is given to the trustee to sell. 2d, The payment of certain provisions: Thus his widow was to receive 4 s. a-day, his eldest son 6 s. his son Thomas, and his daughter Margaret 4 s. a-day, each, and other three daughters 3 s. each a-day. In the event of the death of Thomas and Margaret, their surviving wife or husband were to have L. 20 a-year, payable half-yearly. The widow of another son was to have L. 10 payable half-yearly, and an old servant and his wife, were to have a certain daily provision. In the 3d place, certain sums were to be paid to the descendants of

of the testator, in all time coming, upon their arriving at the age of twenty-five years; viz. L. 50 to each male, and L. 25 to each female, with which sums both the subjects and trustees are burdened. This deed likewise declares, “in case any of my children’s descendants shall happen to be in indigent circumstances, then, and in that case, I ordain my disponees before-mentioned, to make payment to each of such indigent person or persons of the sum of 1 s. weekly, to help to educate them, from the time they or each of them are eight years of age, until they attain to fourteen years of age; and at that period my said disponees are to advance and pay L. 5 Sterling as an apprentice-fee to each of them, for putting them to such a trade as they and each of them shall incline to follow.” In the 4th place, the deed provides for each succeeding trustee or factor (besides the 6 s. a-day), the sum of 5 *per cent.* upon all rents and debts he should uplift. The trustee and descendants are directed to chuse a man of business to transact every thing relative to the trust; and quarterly meetings of all the descendants, in all time coming, are enjoined to be held for examining the transactions of the trustee.

By an additional settlement, executed about six months before the death of Robert M’Nair, he provides, that the residue of his subjects, at the end of every seven years, after answering the former purposes of the trust, should be divided amongst his children and their descendants in all time coming, in proportion to the sums of money directed to be paid to them by the settlement.

Robert M’Nair, the granter of these deeds, died in June 1780, leaving six children, of whom Robert M’Nair was the eldest, and consequently heir to his father. The son made up no title to his father’s estate; but he acted under the settlement, and divided the produce of the funds according to the direction of the deed. In the course of this management, however, several questions had arisen amongst those interested in the funds; and these questions were submitted to certain arbiters, pointed out by the father’s conveyance. These questions were undecided at the death of the son; and he being succeeded by his son Robert M’Nair, this last-mentioned person was advised to bring an action, concluding that the fore-mentioned deeds should be set aside: that he should be entitled to serve himself heir to his grandfather, the granter of these deeds; to sell the heritage, and pay off the grandfather’s debts: “And that it shall be found and declared, that the defenders (the descendants of the said Robert M’Nair) are notwithstanding entitled to such a sum or provision, as shall appear to our said Lords, adequate, and in proportion to what

## CASE

## III.

“ the said Robert M'Nair senior intended to have bestowed up-  
 “ on them ; regard being always had to the extent and value  
 “ of the subjects as they now are, or may yield at a sale, and  
 “ not what the said Robert M'Nair senior supposed them  
 “ to be.”

This action came before Lord Eskgrove as Ordinary, and was, by his Lordship, taken to report to the Court, upon informations.

Argument for  
the pursuer.

There are two grounds upon which the deeds in question ought to be reduced. I. That they are *ultra vires* of the granter. II. That they are absurd, irrational, and inextricable.

I. With regard to the *first* point, the effect of the settlement is evidently to sink the property of the subjects, and to put them under a perpetual trust or factory. No such deed is recognised by the law of Scotland : It is not authorised by any precedent, or authority, or practice ; on the contrary, it is inconsistent with the principles of the law of Scotland, which do not allow any property to be *in pendente*. To give countenance to such deeds would be highly inexpedient and impolitic, not only by taking property out of commerce, but by excluding it from all means of improvement.

The defenders have endeavoured to support this deed, from the analogy of entails, of mortifications for charitable uses, and of trust-deeds.

With regard to entails : 1. The property is not sunk ; in the present case it is ; those who succeed being no more than factors or mandatories. 2. There is a material distinction betwixt the endurance and object of entails, and of such a deed as the present, which provides that the proceeds should be divided amongst all the entailer's descendants, however numerous. 3. Entails extend over land-estates which are of a permanent nature ; these deeds relate to houses, which, from their present state, cannot exist for many years.

Mortifications are put under the management of corporate bodies, fully capable of the administration, and even of the improvement of the subject under their care ; and as these bodies remain unchanged, the inconveniencies from the renewal of investitures are avoided.

Again, as to ordinary trusts, these are limited to a certain time, or till the owner be of age ; or they are limited by the very purpose of the trust, as when the subject is conveyed to trustees to be sold, and the price applied in payment of debts, and their incompatibility with feudal principles, or any difficulty which may arise in the renewal of investitures, are either not felt by the shortness of their duration, or avoided in  
 the

the form of the deed ; therefore no argument from any of these cases can affect the present question.

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III.

II. The *second* ground of challenge is, that the deed is irrational. This is a very arbitrary question; but it is one which the Court is often necessarily called upon to determine; as in the case of provisions in favour of children of a second marriage, &c. The case of Lady Cunningham of Caprington's settlements bore a strong analogy to the present; after paying her debts and certain legacies, she ordered her heir to execute a trust-right for securing the remainder of her fortune to be employed by the trustee in relieving her children, grandchildren, and their descendants, to the tenth generation, by distributing at his discretion the annual produce of the fund amongst such as were under difficulties; and the fee was directed to go, after the tenth generation to her nearest heir. Printed minutes in that cause were advised on the 2d July 1757, and although no judgement was pronounced; yet, in consequence of what passed on the bench, the settlements were given up, and a compromise took place: in those minutes, reference was made to the case of Barholm, where an entail was set aside on the footing of its being unintelligible and inextricable in many particulars.

The settlement in this case is infinitely more complicated, and consequently more exceptionable than Lady Cunningham's settlement. That was limited to the tenth generation; this trust is to endure to all generations. The deed here gives the funds in certain proportions among all the descendants, without any latitude to the trustee; and according to the common course of things, the descendants of the testator, must be so intermixed by marriages with one another, that in a few generations, it must be impossible either to number, or to trace them. (Blackst. Com. B. II. c. 14.) How then is the trustee to pay the sum of L. 50 and L. 25, to them upon arrival at the age of twenty-five? How is he to pay the indigent, from the age of eight to fourteen, one shilling weekly? or their apprentice-fee of L. 5? How is he to know what sums to set a-part for those who may be out of the kingdom? And without knowing that, how does he know what to divide amongst those who remain here; and be a right arises to every one of these descendants, which may yet made effectual against the trustee, during any time of the long prescription. Again, what is to become of the obligation to distribute the surplus at the end of every seventh year.

The deeds are absurd too, as the subjects are of a perishable nature; as there is no provision for the insanity, or minority, or non-acceptance of a trustee; and as the funds are totally inadequate to the purposes of the trust.

The

## C A S E

## II.

Argument for  
the defender.

The pursuer has founded his action of reduction upon two grounds : I. That the deed is *ultra vires* of the testator. II. That it is irrational and inextricable.

I. Robert M'Nair, the maker of the deed, was the absolute proprietor of the subjects, and was entitled to dispose of them under whatever conditions he might think proper, provided they were not contrary to law. The question, therefore, is, whether a proprietor can vest his estate in a series of trustees, though it may happen that the trust may be perpetual? A trust of that nature is not reprobated by law; and in fact many such exist in this country. Thus, the management and revenue of Watson's and Heriot's hospitals, are vested in trustees, by a perpetual trust.

Some trusts may be for a definite, and others for an indefinite time; but the only object of enquiry, either in the one case, or in the other, is the nature of the trust; if the purposes of it be legal the deed must have effect. Here the trust, although it may be whimsical, is benevolent; those are named trustees who are to derive the principal advantage from the trust, and there is nothing improper or inexpedient in the application of the funds.

It has been said, however, that the present trust differs from those of Watson's and Heriot's hospitals, in this, that it is given to individuals, and so is subject to many difficulties, arising from the rules of the feudal law, whereas the others are vested in corporations. But however competent this may be to the superior, it is *jus tertii* to the pursuer. Besides, it is a strange absurdity for the pursuer to maintain, that a trust-right, which gives away an estate to strangers, and which has every chance of being perpetual, should be a proper and a legal trust, while one which provides the estate to the heirs of the proprietor, and has less chance of being perpetual, is irrational and unlawful.

II. It is admitted that the question, whether a deed be irrational or not, is entirely arbitrary. But it is a question into which judges will enter with the greatest delicacy and circumspection; and however complicated a deed may be, if the views of the testator be legal, it will be carried into execution. In the present case, the object is a legal one, the mode which has been followed has been sanctioned by the laws, and although events may happen in the course of the trust, which were not foreseen, and have not been provided for; yet until they actually occur, a court will not interfere, nor will it on such grounds set aside the deed.

The case of Barholm has been referred to, but it differs most materially from the present. There was there a strict entail, and the heir was to draw but a very small part of the annual produce; the bulk of which was destined to purchase  
other

other estates to be entailed in the same manner with the first. It was therefore an entail which might in time have included the whole property in Scotland. The other case, of Lady Betty Cunningham, never was decided, though it too differed from the present in this respect, that the annual produce was withdrawn from the use of the heirs, unless under particular circumstances.

Many of the clauses of the deed under reduction have been founded on, in order to show in how short time it must become inextricable. But to all these cases it is a sufficient answer, that there is no absolute certainty that these events will ever arise. Another objection has been founded on the insufficiency of the funds to answer the purposes of the deed; but the state upon which this objection has been made, is a most erroneous one, the funds are sufficient for the present purposes, and for any demand that is likely to be made upon them.

Lord Monboddo—gave an opinion for supporting the deed.

Opinions.

Lord Swinton.—Notwithstanding what I have just heard, I remain of a different opinion. *Testamenti factio est juris civilis—Quisque est rei sue moderator et arbiter*, and so he is when alive; but by the Roman law, and that of all nations who follow that law, this goes no farther than to give a right of bequeathing to one person. When the subject bequeathed comes to that person, he is sole proprietor. Our law, however, goes a step farther. The common law permits a substitute to be named; but the statute authorises an entail. This, however is not an entail, and it is pregnant with a thousand inconveniencies. I have always been averse to perpetuities. The first reason of reduction is sufficient for cutting down the deed. The encrease of descendants too (and they may encrease like the sand of the sea) would render this trust inextricable. But there is no occasion to seek for any other ground than the first reason of reduction.

Lord Justice Clerk.—I always feel myself very averse from altering a will. When a court alters a man's will, it makes one for him. If a will be contrary to law, then it is truly no will, and may be set aside; but if not contrary to law, and if it be extricable it ought to be supported. The deed before us, has subsisted and has been carried into effect for twelve years. I therefore see no reason for cutting it down. Trust-deeds may be made in a great variety of forms; they may be for a limited endurance, or for perpetuity; and if not *contra bonos mores* or prohibited by law, they must be sustained. By the law of Scotland, a person who is not limited in the use of his property, may execute an entail. It has been said, that this power

has

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III.

has been derived from the act of parliament; but this is a mistake: Entails were in use long before the statute, and many questions have come before this Court, in which entails were sustained prior to that enactment. Many estates were entailed before that time, and the statute was intended for a different purpose altogether; it was meant to prevent fraud. The legislature said to the gentlemen of Scotland, "You have, no doubt, a right to entail your estates; but as we foresee many inconveniencies, which must arise to creditors, if this practice should become common, you must execute your entails under the forms which we now prescribe, for the benefit of those with whom you transact." No statute was necessary to authorise a proprietor to entail; for that power he possessed at common law: Accordingly, if the forms and requisites of the act be not followed out, the entail is not good against creditors and purchasers. But though these forms are omitted, still the entail is effectual against the heir. I am, therefore, of opinion, that the first reason of reduction is not good: consequently, I agree with my brother who spoke first. There have been cases stated which are not material to the cause, and which do not fall under the consideration of the Court at present.

Lord *President*.—Notwithstanding what I have heard, and the inclination I have to support wills, from the regard due to them, I cannot sustain the reveries of madmen. I understand, that both before and since the act of parliament, a certain form is necessary for entailing an estate. But I confess, that this deed, which declares the estate to be a trust, and to continue in the granter's heirs, under such whimsical directions, is of a nature that I can make nothing of. It is an anomalous trust, not limited, but going on for ever. It declares, that the trustee in possession, shall hold himself trustee for the descendants, distributing amongst them shillings, &c. This is a novelty. The only similar case is Lady Betty Cunningham's, and there the trust was to continue in force only for so many generations. I do not know that a decision was given in that case. But it came into Court; and either by the advice of friends, or in consequence of what passed here, it was submitted, and the funds divided, under the direction of an arbiter. The act 1685 begins with a declaration of the common law; and goes on to declare the power that was to be given to proprietors of land: But had the legislature believed it possible that such a case as the present could exist, it would have been provided against. This deed is inconsistent and contradictory in two material clauses. Daily provisions are made to certain persons; and this may be capable of being carried on by the income of the estate. But besides these, which it is declared are not to exceed the income of the estate, there is a clause which orders the trustee to give L. 50 to the heir-male, and L. 25 to the heir-

heir-female, on their attaining majority: besides which, there are other provisions to descendants in indigent circumstances. It may be said that these are not inconsistent, as the only consequence is, to reduce the daily provisions: But it is further declared, that the trustee shall, at the end of every seven years, make a distribution of any surplus funds remaining in his hands; consequently there can be no funds to supply the extraordinary provisions, and these must of course encroach upon the principal, and put an end to the trust. It is true, this trust has been carried on for twelve years; but so far from being peaceably conducted, the parties have been continually fighting: They have been forced to have recourse to the Dean of Guild of Glasgow in terms of the deed; and although he (who is a very sensible man, and acquainted with business) has laid down rules, which have made it possible to carry on the trust; yet the disputes have been innumerable, and many of the questions have come to the courts of law. We cannot therefore give a sanction to this deed.

A proper concession has been made on the part of the pursuer; he has agreed to let the younger children draw the capital, corresponding to their interests in the fund, and this is all that can be required of him. Were we not to reduce this deed, I can suppose titles made up to the grandfather, and the feudal right being completed in the pursuer, a sale may take place; there is nothing on record to prevent this. Or the heir may contract debts, and so the estate may be carried off.

Lord *Eskgrove*.—I had a strong inclination to set aside this deed, as the execution of the trust had occasioned such confusion; but I was doubtful whether there were sufficient grounds to authorise such a decision. This is not the reduction of a deed of an anomalous nature, but an action for carrying it into effect. The Court is not bound to make a deed better than it is; when it comes into an inextricable situation they may refuse to give redress; and in this way the deed may be reduced. The heir here can have no concern with the estate, but as disponent of the granter; there is no antecedent obligation in the marriage-contract, by which the estate must go to him: he may reject, but another will accept of the deed; and had he made up titles *aliunde*, the next trustee might have raised an action, and executed an inhibition against him, to prevent him from defeating the trust. This deed might have been effectually conceived to a body corporate, with directions to employ the fund in paying provisions to all eternity: it must be equally valid when it is directed to the heir as trustee; and the heir entering under that deed, must act in conformity with it. As heir of the granter, the pursuer cannot call this deed in question, but on grounds good in law, and I see no such grounds; I am desirous of putting an end to it; but as the matter is not

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III.

yet inextricable, we cannot do it. The only question is whether it be a legal deed, and I think it is legal.

Lord *President*.—The import of such a decision then will be, that although the deed be not reducible, on account of its form, the parties may afterwards set it aside, when it shall have become inextricable.

Lord *Dunsmuir*.—Though a whimsical deed we cannot set it aside.

Lord *Swinton*.—I cannot allow an individual to be in the same situation with a corporation.

Judgement.  
May 18, 1791.

Upon report of Lord Eskgrove, and having advised mutual informations for the parties; the Lords repel the reasons of reduction, assoilzie the defenders, and decern.

A reclaiming petition was appointed to be answered; and, on advising it, with the answers, it was refused.

For the Pursuer, Ad. Rolland, and  
Ar. Campbell,  
Defender, Ed. Armstrong, } Advocates.

J. Sommers, } Agents.  
G. Todd. }

Lord Eskgrove Ordinary.

Menzies Clerk.

Vol. II. No. 7.

## TUTOR AND CURATOR.

SUSANNAH VERE, one of the Tutors of her son DANIEL VERE,  
Esq; of Stonebyres.

AGAINST

THOMAS Earl of Hyndford, &c. the other Tutors.

*A sine quo non* has a power of putting a negative on the resolutions of the other tutors.

C A S E  
I.

JOHN VERE, Esq. of Stonebyres, “ appointed Susannah  
“ Vere (his spouse) Thomas Carmichael, Esq; of Maulesly,  
“ (Earl of Hyndford), John Hamilton, Esq; of Westburn,  
“ William Porteous, Esq. of Carmacoup, John Bannatyne,  
“ Esq; of Castlebank, and Robert Bell clerk to the signet, to  
“ be

“ be tutors and curators to Daniel Vere, his only son : and ap-  
 “ pointed three, or a majority of the above named persons ac-  
 “ cepting, or surviving, to be a quorum, the said *Susannah*  
 “ *Vere, while a widow, and in life, being always one, and SINE*  
 “ *QUA NON*; and in the event of her death, or of her enter-  
 “ ing into a second marriage, a majority of the said tutors  
 “ accepting and in life, to be a quorum : And in case of their  
 “ being reduced to two, or one, the whole office to be vested in  
 “ such surviving person or persons, with full power to them,  
 “ or their quorum, to dispose of, manage, &c.”

The rest of the tutors agreed to accept of this nomination, only on Mrs. Vere's granting a deed, “ renouncing the pre-  
 “ ference in her favour in the said nomination of tutors and  
 “ curators ; and binding herself to hold every act and deed  
 “ done by the majority of the above-named tutors and cura-  
 “ tors in the lawful administration of the pupil's affairs, to be  
 “ valid and good.”

A difference of opinion having arisen, Mrs. Vere, wishing to have herself freed from the deed of restriction, brought a reduction of it. The tutors, on the other hand, holding this deed to be merely explanatory of what was in law the true nature of a *sine qua non's* office, brought an action for having it declared, that the nomination of Mrs. Vere, as *sine qua non*, was merely for the purpose of constituting a quorum of one half of the tutors ; and at any rate, that it can imply no more than that the *sine qua non* shall accept, be present, and assist by her deliberation, or vote at the meetings of the tutors ; that in no shape can it infer a power of controul. The tutors also concluded, that should this be found to imply a power of controul, and should the deed of restriction be reduced, they, as conditional acceptors, should be allowed to renounce the office.

The question came before the Court, on informations.

There are here two questions : 1. Supposing the appoint- Argument for  
 ment of the *sine qua non* to have been general merely, would the tutors.  
 it have bestowed, on the person named, a power of controul  
 over the other tutors. 2. As the nomination is conceived in  
 this case, does not the appointment of *sine qua non* apply to  
 the constitution of a quorum merely.

I. The former of these is a very general question, and of great importance.

1. This question has never been decided ; and our authors have never given any opinion on it. A single distinction will show, that the decisions founded on by Mrs. Vere, and which at first sight seem to be precedents in this question, are in reality quite inapplicable. The decisions hitherto pronounced have been in cases where there was a failure in the nomina-

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I.

tion, and where the question was, whether the whole appointment did not fall: here, on the contrary, there is no failure; all the tutors are alive, have accepted, and are willing to act, and the question is, what are the *powers* of the *sine qua non*? In the cases of *Fawside v. Adamson*, Haddington, 12th December 1609.—*Ellis v. Scott*, 15th February 1672.—*Watts v. Scrymgeour*; Fountainhall, 22d December 1692.—*Marquis of Montrose*, 1st February 1688; *Harcarse*, p. 281.—*Blair v. Ramsay*, 14th February 1735.—And *Dunmore v. Somerville*, 16th June 1742; *Kilkerran*, p. 585.—The only question was, whether the nomination had fallen? and when in such cases the Court finds that the death or non-acceptance of a *sine quo non* vacates the nomination, they do in no degree fix the *powers* of that *sine quo non*. For, whether it be a power of imposing a negative, or a privilege merely of being present at the meetings, the will of the testator is unfulfilled, if the *sine quo non* does not exist or accept.

As to our authors, the earlier, mention nothing of nominations of tutors; the feudal law was then in its vigour, and the superior was the guardian of his vassal. Stair speaks only of failures in the nomination, B. I. tit. 6. § 14. and the authority of the later writers depends on the meaning of the word *concurrence*; Bankton, (B. I. tit. 7. § 22.) and after him Erskine (B. I. tit. 7. § 15.) say, that the concurrence of a *sine quo non* is necessary: unless this mean consent, it avails Mrs. Vere very little. But the true meaning is a participation merely in the deliberation of the tutors: For, 1st, The whole of those present, at a meeting of any kind, are properly said to concur in what is done, although it be determined by a majority only. 2d, That this is the true meaning of the word *concurrence* is well laid down by Lord Kaimes, who says, (Principles of Equity, Vol. II. p. 286.) “ But though “ all must *concur*, it follows not that all must *agree*; if they “ be all present, the will of the maker naming them is fulfilled; and what remains is, that the opinion of the majority “ must govern the whole body.” 3. That the authors quoted also understood the word in this sense, is clear from their applying it to cases where *consent* is not necessary. Both Bankton and Erskine say, the concurrence of the quorum, or of every one of the tutors named jointly, is necessary: yet they could never understand that the express consent of each of a quorum, or of every joint tutor, was indispensable.

This, therefore, is a new question to be determined by the nature of the office, reasons of expediency, and analogy from other cases.

2. In every instance where the opinions of a number are to be collected, the voice of the majority is entitled to take the lead,

lead. This rule we find established in the constitution of the legislature, in the constitutions of courts, in the decisions of juries, in the conduct of every public meeting. Thus, the opinion of the majority is the decision of the whole; and even the minority are bound to join in carrying it into effect. Lord Kaimes, gives his authority to this opinion, as applied to tutors, Principles of Equity, 3d edition, Vol. II. p. 286, 287. It must require strong evidence, therefore, to show that here a different rule is to be followed; the words must be very clear and plain: Yet the words here used do not imply a power of controul. “*Sine qua non*,” “without which nothing can be done,” (which is a very favourable interpretation) does not imply consent; presence is all that it infers. Indeed no addition can be made to the words *sine qua non*, that can imply any thing more than presence: “without whom no act shall be valid, no meeting shall be legal, no business shall be transacted;” such additions imply presence only: to imply consent, the words *sine qua non* must be rejected, and *sine cujus consensu*, or some similar expression be put in their place. Now, it is not absurd nor useless to require the presence only of a *sine quo non*;—on the contrary, the office explained thus is still beneficial and proper, and gives an honourable distinction to the person in whose favour it is granted; no step can be taken without his presence, no determination formed without his reasoning and vote:—a privilege which was well understood in the Roman law, as appears from L. 17. § 7. ff De recept. qui arbit.

Even in the general case, then, the appointment of a *sine qua non* cannot imply a power of controul in the person so appointed.

II. The appointment here relates not to a general meeting, but to the constitution of a quorum only. By the deed six tutors are appointed. There is also an appointment of a quorum, for facilitating the business, and providing against the accident of all the tutors not being able to attend; and as this quorum was to consist of three, one half of the number, it was necessary to have some way of distinguishing which should be the legal meeting, should the tutors choose to divide, and hold two meetings; just as the fixing of the place and day for the meetings of freeholders, or the appointment of a convener, for the meetings of the commissioners of supply ascertain, which is the legal meeting. The words of the nomination prove this; first, the six tutors are appointed; then, “three, or a majority of the acceptors or survivors are appointed a quorum, the said Susannah Vere, while a widow, and in life, being always one, and *sine qua non*.” This is very different from an appointment of these six as tutors, of whom, Mrs. Vere is always to be one, and *sine qua non*; in the latter case, the

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the office, whatever it be, would exist in every meeting of the tutors; in the former it belongs only to the quorum, and is lost in a general meeting.

It appears then, that the powers of a *sine quo non*, have never been fixed by the Court; that they have been overlooked by our authors; that the power contended for, is against all analogy, unsupported by the words of the deed, or what must be presumed the intention of the testator; and, finally, that this office, be its nature what it may, is lost in a general meeting, and intended merely for the purpose of constituting the legal quorum; and therefore that Mrs. Vere, as *sine qua non*, has no power of controul.

Argument for  
Mrs. Vere.

Mrs. Vere calls for reduction of the deed by which she renounced her privilege as *sine qua non* on the grounds of illegality and incompetency, and as incapable of taking effect without annulling the nomination.

The general rule of law is clear, that a failure in a nomination of tutors cannot be supplied. This is established in the case of Lord Dunmore, reported by Kilkerran, 16th June 1742. See also Principles of Equity, 2d edition, p. 339. And for the progress and principles of our decisions on the question, Ibid. p. 338. An unavoidable failure being irretrievable, how can a voluntary alteration or revocation be admitted? It is impossible. But besides, as the quorum here is three, there may be two meetings whose acts may be equally legal, unless Mrs. Vere retain her office of *sine qua non*. See Erskine, B. I. tit. 7. § 15. at the end.

On the question, what the power of a *sine qua non* is, there can be little doubt. The appointment of a *sine qua non*, in a nomination of tutors, is well known in our law, and the meaning of it never before questioned. See Ersk. smaller Inst. B. I. tit. 7. § 7. Larg. Inst. B. I. tit. 7. § 15. Bankton, B. I. tit. 7. § 22, where it is laid down, that a *sine qua non*'s concurrence is always necessary. Sir George M'Kenzie says he must *consent*, B. I. tit. 7. So it has uniformly been understood in practice. Every man of business would require the consent of the *sine qua non*. He would insist on his signing the deed, along with the other tutors, in token of his concurrence. Indeed every head of a family understands it in the same way, and these tutors themselves had all along the same idea; for they considered Mrs. Vere as possessing a power of controul, which they insisted on her renouncing, before their acceptance.

The tutors claim a power of deciding even in direct opposition to the opinion of Mrs. Vere. Had Mr. Vere considered such a thing as possible, he would have made her sole tutor; for however respectable the other tutors, he knew her to have an

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interest for her son, which none of them could feel; and tho' he might not have such confidence in her knowledge, as to authorise her to act without their concurrence, he could never mean them to have a power of doing what she should disapprove of.

Concurrence implies more than consent, it is used by our writers as the strongest word they could find; it implies that the *sine qua non* must act along with the tutors in every step, not barely consent: "The father (as Lord Kilkerran says, in reporting the opinion of the Court, in Lord Dunmore's case) seems to put no trust in the rest, without the *sine qua non*."

It is said, that Mrs. Vere's powers, as *sine qua non*, are lost in a general meeting. This proceeds on a mistake, as to the meaning of a quorum of tutors; for the whole quorum must concur, and be of the same opinion; and at a general meeting, unless a quorum be of one opinion nothing can be done. As, therefore, the concurrence of the *sine qua non* is necessary to make a quorum, it is equally necessary in a general meeting. In illustration, a deed must be signed either by all the tutors, or by a quorum, and in either case, the *sine qua non* must sign.

The tutors have overlooked the difficulties which their doctrine would lead to. There are here six tutors, three are a quorum, including Mrs. Vere as *sine qua non*; suppose the quorum to meet, the *sine qua non*, is single; but having no negative, the other two carry it against her. But the three absent tutors may be of opinion with the *sine qua non*. Another meeting is held, where they only and the *sine qua non* are present, they must unanimously overturn the former resolution; or if the meeting be full, the former resolution is overturned by a majority of four against two. Thus, doubts would arise in the public mind, and inextricable difficulties occur; but taking Mrs. Vere's powers according to the common understanding and obvious meaning of the testator, every thing is clear and distinct.

The appointment of a *sine qua non* is said to be absurd and unnatural, making useless the nomination of the other tutors. But it is not so; a tutor is useful, as an adviser and check on the rest, independent of his vote. He has also the power of bringing malversation before a Court. The very passage quoted by the tutors, from the civil law, proves the high advantage of a tutor's assistance and advice. Though this passage fails to support the tutor's argument in its whole extent, by proving too much; implying that nothing can be done in the absence of any one tutor.

The expediency of appointing a *sine qua non* with such privileges as have been contended for, is confirmed by long experience. No trustees, however honourable, will pay the same attention with a person interested as Mrs. Vere is; neither can they have those opportunities which she has of acquiring a thorough

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rough knowledge of minute, yet important particulars necessary in the prudent management. Stair says, "tutors and "curators succeed in the room of parents;" if the mother then be alive, it is most natural that she should have the chief management as *sine qua non*. She is well fitted for it by her interest, affection, and knowledge of minute circumstances. And this is well illustrated by the privilege given to the mother and grandmother in the Roman law, contrary to the common rule that a woman could not be a tutor. Justin. Nov. 118.

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Opinions.

Lord Monboddo.—This cause well deserves attention. The case of a *sine qua non* seems to me to resemble that of arbiters, as stated in L. 17. § 7. ff. De recept. Arb. That law required the presence of all the arbiters, though it was not necessary that all should be of one opinion. So should we interpret the privilege of a *sine qua non*, the testator requires his presence, as trusting to his opinion having due weight with the rest, but his consent is not necessary.

Lord Hailes.—The general understanding of the country is that a *sine qua non* has a power of controul. Even the most uninformed have this notion of it: I confess that the expression *sine qua non* appears to me to mean more than presence.

Lord Dunfinnan.—The expression is, Mrs. Vere "being always one, and *sine qua non*." The former expression surely makes presence requisite; the latter must mean something more, which can only be the consent of the person spoken of: It may be said this is merely a tautology, but I think it is something more. I confess, however, that there is some doubt as to the power of controul.

Lord Eskgrove.—I have the same doubt how far a *sine qua non* should have a power of controuling the other tutors.

Lord President.—I have always understood, that where a certain number is appointed a quorum, every deed executed by the tutors must be signed by that number; and so in this case would the name of the *sine qua non* be necessary. I have no idea of the power of a *sine qua non*, unless it mean concurrence, that is consent. Concurrence has been strangely explained. I shall suppose that Mrs. Vere comes to a meeting for the very purpose of opposing a measure; yet this it seems is concurrence. There are six tutors; suppose then that Mrs. Vere and other two meet, and against Mrs. Vere's opinion a resolution is made: then a meeting is held where she and the other two are present, and they come to an opposite resolution; which is to be the ruling one? To avoid such consequences, the *sine qua non* must be held to have a negative.

Lord Eskgrove.—I doubt how far this power is consistent with the nature of the office. The doctrine of tutory comes from

from the civil law. I wish it were possible to point out a text in that law giving a father a power to appoint a tutor *sine qua non*; but this privilege seems rather to have been introduced into our practice, without any precedent in the law of Rome. By giving a power of controul to the *sine qua non*, you destroy the effect of the nomination of the other tutors. This I do not like, and therefore rather incline to give a limited power to the *sine qua non*, making her presence only necessary.

Lord Swinton.—I think, from the words of the clause, that the testator clearly meant to give the *sine qua non* a power of controul.

Lord Rockville.—The *sine qua non* must concur.

The Court pronounced this judgement. “ Upon report of Lord Swinton, &c. the Lords sustain the reasons of reduction, at Mrs. Vere’s instance, against the other tutors and curators, and reduce, decern, and declare accordingly; and, in the counter process of declarator, find, that Mrs. Vere cannot act as tutor or curator by herself, yet that she has a negative on the actings of the pursuers, the other tutors and curators, and declare accordingly.”

Judgement.  
June 1. 1791.

This judgement was brought under review, by a petition for the tutors, resuming the former argument, and stating several difficulties which the decision must give birth to. 1. If a *sine qua non* have this negative, how can a Court authorise any act contrary to her consent? In every nomination the terms are strictly adhered to: Here the testator forbids any thing to be done against the *sine qua non*’s consent; the Court then cannot force it; though absolutely necessary perhaps that something should be done. This power then really resolves into a power of controul, since the tutors must, in cases of necessity, yield; and the judgement is wrong, so far as it gives a power of negative also to the other tutors.

Further argument for the tutors.

2. But supposing that the Court could interfere, is it proper to bring every such question before a Court, wasting and dissipating the minor’s funds in litigation. A father cannot be presumed to have meant this; and therefore an explanation should be given which does not involve such consequences.

3. That the meaning given to the office, by this judgement, is not that which has been generally understood to be the true one, is clear from this, that a reciprocal controul must have brought many questions before the Court, yet none such appear.

The difficulties stated by the tutors are rather imaginary than real.

Answer for  
Mrs. Vere.

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1. The tutors have a mistaken apprehension of the objects and views of testamentary tutors. Tutors are friends of the deceased; not themselves interested; bent all to one object, the welfare of the pupil. They do not come into the office by chance; they are chosen by the father: It is improbable, therefore, that they will be ignorant and obstinate; caprice and ill humour cannot be supposed. Agreeing in the end, it is not likely that they will differ much about the means. Besides, it has been found that a minor cannot be compelled to concur with his curators, and they can do nothing without him; yet it never was thought that curators were therefore useless. *Kilkerran, Drummore, &c. Jan. 27. 1744.*

2. Should they differ, this Court has full power to interfere; nay even to redress any improper resolution, on the petition of any one tutor. Extraordinary cases require extraordinary remedies; but these will be judged of when they occur, and cannot impede the decision of so plain a question as the present.

3. The argument, from the small number of cases, tends the other way, as the real explanation is, that the opinions of our writers have been so clear, that no doubt has ever been entertained.

## Opinions.

*Lord Hailes.*—I am of opinion that by the law of Scotland, the *sine quo non* has a power of controul.

*Lord Dunfinnan.*—I never entertained a doubt as to the meaning of the term *sine quo non* until this question occurred; and after considering the whole of the argument, I am still of opinion, that the *sine quo non*, in a nomination of tutors, has a power of controul.

*Lord Justice Clerk.*—There are many deeds which must be subscribed by tutors; these are good for nothing without the subscription of the *sine quo non*.

*Lord President.*—I observed, when the cause was last before us, that it was a strange explanation which had been given to the word concurrence; holding the *sine qua non* as concurring to measures which she had come for the very purpose of opposing. I have always understood a *sine qua non* to have a negative.

*Lord Eskgrove.*—Till this question occurred I never entertained a doubt of the privilege of a *sine quo non*, being what your Lordships in general conceive it to be; my only difficulty arose from this that I had never met with any such provision in the civil law, and from the negative appearing to render the nomination useless. But on considering the matter with more care, and recollecting that the father might have appointed Mrs. Vere sole tutrix; I cannot deny him the power of effecting the same

same purpose in this manner ; for by naming her *fine qua non*, he has made the other tutors little else than advisers.

Lord *Justice Clerk*.—The other tutors are not mere advisers as Lord Eskgrove conceives. They have powers by which they may prevent any thing from being done, which they think improper. If Mrs. Vere should act unreasonably, for example, and oppose measures proper for the interest of her son, she might be removed as suspected.

The interlocutor affirmed.

For the Tutors, R. Hamilton, }  
Mrs Vere, Jo. Dickson, } Advocates,

Robert Bell, C. S. }  
Arch. Gibson, C. S. } Agents.

Lord Swinton, Ordinary.

Menzies Clerk.

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THE END.

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# ERRORS which the Reader will take the trouble to correct.

Page.

- 8. 3d paragraph of the case, *for* "Boyes" *read* Byres
- 36. l. 10. ——— *f.* 1721. *r.* 1621
- l. 14. ——— *f.* 1682 *r.* 1782
- 82. last line of the 2d par. *f.* again *r.* against
- 103. l. 26. from the top, *f.* preferable *r.* performable
- 139 l. 11. ——— *f.* question *r.* deed
- 141. l. 6. ——— *after* "continue" *add* "bound"
- 146. In the case of Clayton against Graham, it is said that the Lords suspended the letters; but this is a mistake the Court found the letters orderly proceeded: it is a mistake which can have created no confusion, as it is evident from the opinions of the Judges.
- 195. l. 3. from the top, *f.* distinction *r.* destination
- 197. l. 11. ——— *f.* lands *r.* hands
- 203. l. 9. of 3d paragraph, *f.* selling *r.* setting
- 222. l. 17. from top, *f.* eodem *r.* eadem
- 223. last line of the first par. *f.* "shewed" *r.* "fued"
- 231. l. 6. of 2d par. for D. us. *r.* D. de Verb. Sig.
- 237. l. 4. from the top, *f.* while *r.* when
- 236. l. 2. of par. 4. *f.* "in" *r.* "on"
- 257. — in the 2d par. *f.* *matrimonie* *r.* *matrimonio*
- — in the same par. *f.* *reversum* *r.* *versum*
- 261. l. 1. of par. 3. *f.* on *r.* in
- l. 1. of par. 4. *f.* *capones* *r.* *caupones*
- 262. l. 1. of par. 2. *f.* *cupones* *r.* *caupones*
- 266. and 267. in the case and in foot note, *f.* *pitetur* *r.* *petitur*
- 282. l. 2. of par. 3. *f.* Petitioners *r.* Pursuers
- 290. par. 2. of the case, and 291. par. 2. *f.* Suspender *r.* Defender
- 304. l. 6. of par. 2. *f.* *facet* *r.* *facit*
- 311. l. 24. from top, *f.* this *r.* that
- 335. l. 4. of par. 4. *f.* place, *r.* house
- l. 5. of par. 4. *f.* belonged *r.* belonging
- 351. l. 17. ——— *f.* *turpe* *r.* *turpi*
- 363. l. 2. of par. 5. *f.* *dibito* *r.* *debito*
- 377. l. 13. from foot, *f.* *domicile* *r.* *domicilii*
- 381. l. 2. of par. 5. *f.* in *r.* on
- 388. l. 13. from top, *delete* "ed"
- 399. l. 4. of par. 4. *f.* it *r.* is
- 400. l. 11. from top, *f.* honourous *r.* onerous
- 509. l. 2. ——— *f.* duely *r.* surely
- 513. l. 7. ——— *f.* parties *r.* persons
- 515. l. last line of third authority *f.* *legis* *r.* *leges*

\*\*\* A mistake has been fallen into in numbering the pages; from 440, the Nos. of the eight preceding pages are repeated; consequently, after 440, you find 433, &c. It will be necessary to attend to this, in searching the Table of Contents or Index.



















